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American Vertigo: "Dual Use," Prison Physicians, Research, and Guantanamo

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AMERICAN VERTIGO: "DUAL USE," PRISON PHYSICIANS, RESEARCH, AND GUANTÁNAMO

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Physicians can be used by governments for nonmedical purposes, and physician acceptance of their nonmedical use is usually denoted as "dual loyalty," although it is more analytically helpful to frame it "dual use." Dual use of physicians has been on display at Guantánamo where physicians have consistently been used to break hunger strikes as part of the military security mission in ways that directly violate medical ethics. Guantánamo itself has also been seen worldwide as a uniquely horrible prison, which can tell us little about other American prisons. The contrary seems to be true: Guantánamo, and the use and misuse of physicians there, is much more a reflection of the American prison system that an aberration of it. Closing or reforming Guantánamo will not solve the problem of the dual use of physicians in American prisons and the American military. As illustrated by a report of an expert Institute of Medicine committee on research in American prisons, the entire U.S. prison system will have to be reformed to adequately address the problem of dual use of physicians in prisons.

I. INTRODUCTION

The concept of "divided loyalties" is an inherently perverse one, suggesting that loyalty is negotiable and never trustworthy. This is how many Americans felt about the Japanese-Americans in World War II, and is why Japanese were confined in concentration camps, even though there was

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no evidence that they were disloyal to the United States.[1] The terms "divided loyalty" and "dual loyalty" were used as a rationalization for taking action against them. Something similar is going on when this term is deployed to describe physicians in the United States military: that they have divided or dual loyalties because they face inherent conflicts between their obligations as physicians and their obligations as military officers. My own view is that this is simply false; the entire rationale for having a military medical service is to provide the best medical care possible to the U.S. military—and that such care can only be provided if soldiers trust military physicians to follow medical ethics without exception.[2]

Military commanders in charge of prisons do, however, attempt to use military physicians for nonmedical, security purposes. In this regard, it is more analytically useful to think about this as a case of "dual use," in the same sense that medically beneficial products and processes can also be used as weapons to harm people. Physicians, both military and civilian, can also make "dual use" of people when practicing medicine: treating them for their medical condition, and thus as a patient, but also using them as research subjects to test a hypothesis. It is also possible that military physicians could find themselves confronted by both types of dual use; for example, ordered to experiment on their patient-prisoners by their superiors. Thus, it makes sense when reviewing attempts to make dual use of military physicians in prisons that we simultaneously look at the dual use of prisoners—as patients and research subjects—that some physicians propose themselves.[3]

The primary places where dual use of military physicians has occurred is in the post 9/11 prisons at Bagram Air Force Base, Abu Ghraib, and Guantánamo.[4] The first two have been renamed—in an unrealistic attempt to rehabilitate them.[5] Guantánamo, however, seems likely to stay

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[1] Ilan Zvi Baron, *The Problem of Dual Loyalty*, 41 CANADIAN J POLITICAL SCI 1025, 1033 (2009).

[2] George J. Annas, *Military Medical Ethics: Physician First, Last, Always*, 359 NEW ENGLAND J. MED. 1089–90 (2008).

[3] *Cf.* GEORGE J. ANNAS, WORST CASE BIOETHICS, 68–69 (2010).

[4] *See, e.g.*, Workshop Summary, *Institute of Medicine, Military Medical Ethics: Issues Regarding Dual Loyalties*, ix (Sep. 8, 2008), *available at* http://www.nap.edu/catalog.php ?record_id=12478.

[5] *See, e.g.*, Michael Phillips, *U.S. Seeks Friends in Afghan Detainees*, WALL ST. J., Mar. 5–6, 2011, A11 ("The U.S. military is trying to turn its detention system in Afghanistan, long a public relations disaster, into an asset in its campaign to win over the public.") *and* Farah Stockman, *Kinder Prison, Swifter Justice for US Detainees in Afghanistan*, BOS. GLOBE, Jan. 18, 2011, A6. This strategy is, however, unlikely to succeed given past history and the large number of prisoners held in other Afghanistan prisons that are effectively run by the Taliban. Ernesto Londono, *Insurgents Find Support Among Fellow Prisoners*, BOS. GLOBE, March 13, 2011, A15.

open and functioning with its original name indefinitely.[6] The role of military physicians there is doubly complicated by the fact, recognized by the U.S. Department of Defense, that the continued force feeding of competent hunger strikers at Guantánamo is a direct violation of medical ethics as articulated by the World Medical Association (WMA) and the American Medical Association.[7] This situation (officially requiring military physicians to ignore medical ethics precepts) is unique in American military history, and one that I have written about before.[8] In this Article, I will say more about hunger strikes at Guantánamo, but I will also examine another duality, refuting the claim that military prison at Guantánamo, and the dual use of physicians there, is so unique that it should be seen as an aberration in the American justice system, rather than as a mirror image of the worst aspects of U.S. mainland prisons. The way wardens, physicians, expert commentators, and the courts have justified nonmedical and coercive acts by physicians is bizarre enough to cause vertigo, and this helps explain my title for this Article. And because the anti-prisoner actions seem to me to be entirely consistent with America's view of the dangerousness of its large prison population, "American vertigo" seems appropriate as well.

American Vertigo is also the title French philosopher and journalist, Bernard-Henri Levy, gave to his observations of America that he made after retracing the footsteps of Tocqueville.[9] Like a leading U.S. expert group that championed doing more medical research on prisoners—the Institute of Medicine's (IOM) Committee of Prisoner Research (Committee)[10]—Levy began his journey in 2005. This was four years after 9/11 and the com-

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[6] Scott Shane & Mark Landler, *Obama, in Reversal, Clears Way for Guantanamo Trials to Resume*, N.Y. TIMES, March 8, 2011, A19; Hendrik Hertzberg, *Prisoners*, NEW YORKER, Apr. 18, 2011, 45–46.

[7] ANNAS, WORST CASE BIOETHICS, *supra* note 3 at 64. *See also*, *Media Roundtable with Assistant Secretary Winkenwerder*, DEPARTMENT OF DEFENSE (June 7, 2006), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=33.

[8] ANNAS, WORST CASE BIOETHICS, *supra* note 3, at 59–74.

[9] BERNARD-HENRI LEVY, AMERICAN VERTIGO: TRAVELING AMERICA IN THE FOOTSTEPS OF TOCQUEVILLE (Charlotte Mandell, trans., 2006).

[10] The Committee's formal name is longer, "Committee on Ethical Considerations for Revisions to DHHS Regulations for Protection of Prisoners Involved in Research." *Project Information*, INSTITUTE OF MEDICINE, http://www8.nationalacademies.org/cp/projectview.aspx?key=HSPX-H-04-06-A (last visited Apr. 14, 2011). I choose human experimentation to compare with force-feeding of hunger strikers because medical experimenters have also been charged with having dual loyalties---even leading dual lives:

> Contemporary medical researchers often lead double lives in pursuit of their research goals . . . Like the knights of old, their quest for the good, whether progress in general or a cure for AIDS or cancer specifically, can lead to the destruction of those human values such as dignity and liberty that we hold central to civilization.

George J. Annas, *Questing for Grails: Duplicity, Betrayal and Self-Deception in Postmodern Medical Research*, 12 J. CONTEMP. HEALTH LAW POLICY 297, 298 (1996).

mencement of our "global war on terror," and three years after Guantánamo was opened. The centerpiece of this war has been to capture would-be terrorists and interrogate them in our greatly expanded global prison system, especially, as previously noted, in Afghanistan, where the most infamous was Bagram Air Force Base; in Iraq, which featured Abu Ghraib; and in Cuba, which features Guantánamo. At all of these prisons, the Central Intelligence Agency and the American military have inflicted tortuous acts and cruel and degrading treatment on prisoners.[11] At home, the U.S. prison population continues to grow, and the United States has set a new world-record in terms of the percentage of the civilian population in prison.[12]

In March 2011, President Barack Obama, reversing his promise and position that he would close the prison in Guantánamo Bay, decided instead to reinitiate military trials there and keep the prison open indefinitely.[13] The reason the President originally pledged to close Guantánamo was his belief that it was a uniquely horrible prison, "quite simply a mess, a misguided experiment."[14] He is not the only one to refer to Guantánamo as an experimental prison. A Senate investigation found that commanders at the prison often referred to it as "American's Battle Lab" where untested methods of interrogation, which were "to some degree experimental," were tried out.[15] I have also previously suggested that the use of "restraint chairs" by the medical staff at the prison to break the 2005–06 mass hunger strike there could also be seen as experimental, since they had never before been used for this purpose .[16] In this Article, I will use this "experimental" designation to explore the question of whether the President was right initially to see Guantánamo as an aberration of American justice and the American prison sys-

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[11] ANNAS, WORST CASE BIOETHICS *supra* note 3, 41–57 and sources cited therein. *See also Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and its Impact*, PHYSICIANS FOR HUMAN RIGHTS, http://brokenlives.info/?page_id=69 (2008), and U.N. Human Rights Council, Joint Study on Global Practices in Relation to Secret Detention in the Context of Counering Terrorism, Feb. 19, 2010, *available at* http://www2.ohchr.org/English /bodres/hrcouncil/doc/13session/A-HRC-13-42.pdf.

[12] *See, e.g.*, Adam Liptak, *US Prison Population Nears 1.6 Million*, N.Y. TIMES, Feb. 29, 2008, http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html; *and* N.C. Aizenman, *New High In U.S. Prison Numbers*, WASH. POST, Feb. 28, 2008, Al; Lisa Moore & Amy Elkavich, *Who's Using and Who's Doing Time: Incarceration, the War on Drugs, and Public Health*, 98 AM. J. PUB. HEALTH 782 (2008).

[13] Exec. Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011), http://www.gpo.gov/fdsys/ pkg/FR-2011-03-10/pdf/2011-5728.pdf.

[14] ANNAS, *supra* note 3, at 69; *see also* PHYSICIANS FOR HUMAN RIGHTS, EXPERIMENTS IN TORTURE: EVIDENCE OF HUMAN SUBJECT RESEARCH AND EXPERIMENTATION IN THE "ENHANCED" INTERROGATION PROGRAM 3 (2010) (equating torture monitoring to experimentation by linking water-boarding, pain infliction and sleep deprivation to research designed to elicit information during interrogations).

[15] ANNAS, *supra* note 3, at 69.

[16] *Id.* at 60.

tem, or whether Guantánamo is more properly seen as a logical extension of the American prison system, as Levy maintained, and as President Obama now seems to accept as well. I will approach this question by examining in some depth an IOM report on human experimentation in American prisons issued during the Bush administration, with a view to determine how Guantánamo "fits" into the landscape of American prisons, American justice, and American research.

II. THE IOM PRISON RESEARCH COMMITTEE

The IOM Committee described its charge: "to examine whether the conclusions reached by the national commission [National Commission for the Protection of Subjects of Biomedical and Behavioral Research] in 1976 remain appropriate today."[17] There was no identification of any major problems with prison research in the United States that would have provided a framework for the committee's work.[18] Instead, the structure was to consider changes in prisons and medical research that might lead to a reconsideration of existing rules, and to suggest an approach that would permit more research on prisoners. To oversimplify somewhat, the committee's report follows a syllogism:

1. Research is beneficial.
2. Prisoners should have access to that which is beneficial.
3. Therefore prisoners should have (more) access to research.

A parallel syllogism seems to have been applied at Guantánamo in response to the hunger strikes:

1. Hunger striking risks the prisoner's life.
2. Physicians should prevent prisoners from risking their lives.
3. Therefore, physicians should prevent prison hunger strikes.

Both syllogisms have problems. The primary one with the first syllogism is that it conflates research with treatment (usually woefully inadequate in

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[17] COMM. ON ETHICAL CONSIDERATIONS FOR REVS. TO DHHS REGS. FOR PROTECTION OF PRISONERS INVOLVED IN RES., INST. OF MED. OF THE NAT'L ACADS., ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS 24 (Nat'l Acads. Press, 2007).

[18] Although the IOM Committee itself found prison research acceptable, critics disagreed. *See, e.g.*, Bernice S. Elger, *Research Involving Prisoners: Consensus and Controversies in International and European Regulations*, 22 BIOETHICS 224–38 (2008) (proposing an "equivalence of care" system to address the lack of voluntary consent by prisoners to be research subjects); *see also* Osagie Obasogie, *Prisoners as Human Subjects: A Closer Look at the Institute of Medicine's Recommendations to Loosen Current Restrictions on Using Prisoners in Scientific Research*, 82 STAN. J. C.R. & C.L. 41 (2010) (thoughtfully critiquing the IOM Committee's approach).

prisons), thereby making a dual use seem like a single use. The same is true of the second syllogism, where force-feeding hunger strikers is equated with medical treatment. But there are others: prisoners are not granted all the benefits of free living people, and prisoners are uniquely situated in ways that compromise their autonomy and make voluntary consent especially problematic.

But even this syllogism structure is grossly oversimplified, as the IOM report itself provides support for almost every position one might have to either promote or restrict research on prisoners. Most often, the goal is stated as expanding research on prisoners, but at other times the stated goal is to protect prisoners from exploitation.[19] Sometimes informed consent is seen as too important in current regulations and replaceable, other times it is seen as central and nonnegotiable.[20] Sometimes prisons are seen as the new mental health institutions; other times the as-yet-un-adopted regulations on research on the mentally disabled are viewed as irrelevant in the prison setting.[21] Children are excluded from the analysis, but the children's research regulations are sometimes viewed as a model for changing the prisoner regulations.[22] No specific language is ever suggested as to how the current prisoner regulations might be modified.

How did the Committee adopt such a confused and internally inconsistent report? My own view is that by so abstracting the issue of research on prisoners from the questions of how they became prisoners, why we have more prisoners per capita than any country in the world, why African Americans and Hispanics are so overrepresented in prisons, and what the impact of the global war on terror is on our view of prisoners and their rights, the entire exercise became so disconnected from the real world that it could produce no useful public policy recommendations. As will be addressed later, similar observations apply to breaking the hunger strikes at Guantánamo.

The definition of prisoner is the central issue in any discussion of research on prisoners. The Committee knows this, but nonetheless insists on expanding the definition of "prisoner" from the current one that includes those "involuntarily confined or detained in a penal institution" to include an additional five million non-prisoners (unconfined people on probation and parole).[23] This begs the question of why we should have separate rules for prisoners at all (if not because their involuntary confinement makes voluntary consent extremely unlikely), and why we should not just include all

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19 *See* IOM Committee, *supra* note 10, at 4, 115.

20 *See id.* at 4, 147.

21 *See id.* at 44, 57.

22 *See id.* at 3 n.1, 79.

23 *See id.* at 102–03.

potential research subjects under the term "prisoner?" This is the central conceptual problem with the IOM's report.

Two more concrete operational problems undermine the report's credibility. The first is that while expanding the definition of prisoner radically, the report simultaneously contracts it by excluding from consideration not only children and involuntarily confined mental patients, but also prisoners held under the U.S.A. Patriot Act.[24] The report did not specifically exclude Guantánamo and Abu Ghraib, but nonetheless fails to even mention these two American prisons.[25] The second concrete problem with the report is its internal incoherence. There are, for example, only two chapters devoted to "ethics," and these often read as if they were written by two separate committees (or study directors) that had fundamental disagreements. The report really does induce vertigo. Each of the two major operational flaws merits discussion.

III. AMERICAN PRISONS AT HOME AND ABROAD

Writing a report about research on prisoners without acknowledging the increasing role of prisons and mistreatment of prisoners can only paint a partial picture. By far the most famous prison in the world is Guantánamo Bay, and the most infamous prison in the world is Abu Ghraib. This was also true when the Committee was working on their report.

How is it possible that an IOM committee on the ethics of prison research could proceed as if these prisons did not exist? It was, of course, Bush Administration doctrine that "we do not torture," that Abu Ghraib was the result of a few bad apples on the night shift, and that Guantánamo only holds the "worst of the worst" and is necessary to prevent another 9/11.[26] But IOM study committees should proceed from science and data, not from the political ideology of the administration in power. Nonetheless, these prisons were so central to the Bush Administration's view of what is and is

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[24] *Id.* at 26 n.1.

[25] The committee itself seems to have been conflicted on this topic, as indicated by a footnote that appears twice in the report: "The committee decided to exclude children (unless treated as adults), military personnel, persons under restricted liberty due to mental illness, and persons outside the criminal justice system, such as those detained by the U.S. Patriot Act [sic]." IOM Committee, *supra* note 10, at 3 n.1, 26 n.1. Although this language does not specifically exclude Guantanamo and Abu Ghraib or any other prison outside the U.S., the committee likely made a conscious decision not to mention them. Neither of these prisons appear anywhere in its report, even in footnotes.

[26] Richard Benedetto, *Bush Defends Interrogation Practices: "We Do Not Torture"*, USA TODAY, Nov. 7, 2005, *available at* http://www.usatoday.com/news/washington/2005-11-07-bush-terror-suspects_x.htm; *see also* Phillip Carter, *The Road to Abu Ghraib*, WASHINGTON MONTHLY, Nov. 2004, *available at* http://www.washingtonmonthly.com/features/2004/0411.carter.html; Katty Kay, *No Fast Track at Guantanamo Bay*, BBC NEWS, Jan. 11, 2003, *available at* http://news.bbc.co.uk/2/hi/americas/2648547.stm.

not acceptable to do to prisoners (both under domestic and international law) that it would be unthinkable to prepare a report on U.S. research on prisoners without at least mentioning, if not analyzing, them.[27]

The Committee's chairman, Professor Lawrence Gostin, seems to agree with this assessment. In a summary of the report for the readers of the *Journal of the American Medical Association*, written in the wake of criticisms of the report, he wrote that "[t]he IOM report recounted the painful history of medical mistreatment in the Tuskegee syphilis trials and Holmesberg prison, as well as prisoner abuse at Guantánamo Bay and Abu Ghraib."[28] I do not believe that Professor Gostin meant to intentionally misrepresent his Committee's report to an audience of physicians unlikely to ever read the report itself. Rather, I think he was simply reflecting his view that the report would have no legitimacy if it did not include reflection on these prisons; therefore, it must have included them—even though it did not. But there is a logical and reasonable rationale for either not treating Guantánamo at all or treating it as an afterthought: the IOM Committee members really did see Guantánamo as nothing special or different from other U.S. prisons, and thus did not see it as necessary to make any specific comments on it.

Gostin also mentions Nuremberg, Holmesberg prison, and Tuskegee. The latter, of course, did not involve research on prisoners, but on free-living African Americans. It is nonetheless relevant because of its racism, which is mirrored in the American prison population, which is disproportionately comprised of African American males found guilty of drug-related crimes.[29] Racial disparities in medicine are now widely condemned, but grossly disproportionate racial distributions in prisons seem well accepted. The IOM report reflects this view. The Committee recognizes the incredibly disproportionate numbers of African Americans and Hispanics in our prisons, but the report never addresses the issue or makes any suggestions of why it might matter, even concerning virtually all-African American prisons like Holmesberg.[30]

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[27] *See, e.g.*, Elie Wiesel, *Without Conscience*, 352 NEW ENGL J. MED. 1511, 1511–13 (2005).

[28] Lawrence O. Gostin, *Biomedical Research Involving Prisoners: Ethical Values and Regulation*, 297 JAMA 737, 739 (2007).

[29] *See* ANNAS, *supra* note 3.

[30] A. M. HORNBLUM, ACRES OF SKIN: HUMAN EXPERIMENTS AT HOLMESBURG PRISON (Routledge, 1998). *See also* M. HORNBLUM, SENTENCED TO SCIENCE: ONE BLACK MAN'S STORY OF IMPRISONMENT IN AMERICA (U. Pennsylvania U. Press 2007). In an epilogue to this book he criticizes the IOM report, arguing that it is ahistorical:

> More than forty years of intimate involvement in prisons—both here and abroad—has taught us [Hornblum and the subject of his book, Edward "Yusef" Anthony] that true prison reform, in whatever manifestation, is either illusory, ephemeral, or so watered down that it is merely a charade orchestrated by those in power. The

IV. THE NUREMBERG CODE AND INTERNATIONAL LAW

Using Tuskegee as a cipher to represent racial injustice without actually dealing with the problem of race may have made it seem reasonable to use Nuremberg as a cipher as well and to ignore its meaning. The Committee writes simply that "[t[he commission's [National Commission] deliberations took place against a background that included the Nazi experiments with concentration camp prisoners followed by the adoption of a stringent standard of voluntary consent in the Nuremberg Code." [31] There is no discussion of what research was actually conducted by Nazi physicians in the concentration camps, of the prosecution of these physicians by American prosecutors to a court composed of American judges, or of the rationale for the Nuremberg Code and its direct application to the American military, American prisoners, and American researchers. Instead, the Committee seems to view the Nuremberg Doctors' Trial and its resultant Nuremberg Code as an historical anomaly rather than as the foundational ethical and legal text for the worldwide regulation of all experimentation on humans.[32]

Because the Bush Administration was trying to marginalize related international treaties, including the Geneva Conventions and the Convention against Torture, it may have seemed reasonable to the IOM Committee to simply adopt the Bush administration's dismissal of international humanitarian and human rights laws. Gostin, suggests this explanation in writing about his own change of philosophy regarding human rights and civil liberties. In accepting an invitation to rewrite public health laws to give public health officials more power over Americans after 9/11, Gostin writes: "I had no desire to work for the Bush Administration, but when I was informed that if I did not accept, the White House planned to draft the law internally, I reluctantly accepted, after seeking whatever assurances I could of non-interference."[33]

> history of imprisonment in American is one of good intentions gone awry, bad practices solidified, and hope all but extinguished.

Id. at 197; *See also*, Amnesty Int'l, *United States of America: Rights for All*, AI Index AMR 51/35/9 (1998), *available at* http://www.amnesty.org/en/library/asset/AMR51/035/1998/en/0440cd04-da99-11dd-80bc-797022e51902/amr510351998en.pdf (detailing the conditions of U.S. prisons).

[31] ETHICAL CONSIDERATIONS, *supra* note 17, at 114.

[32] International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171, (entered into force March 23, 1976). This also permitted the committee to ignore the international law documents that followed, especially the International Covenant on Civil and Political Rights, which, among other provisions, states clearly, in article 7 that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. *In particular, no one shall be subjected without his free consent to medical or scientific experimentation*." (emphasis added).

[33] Lawrence O. Gostin, *From a Civil Libertarian to a Sanitarian*, 34 J. LAW & SOCIETY 594, 614–615 (2007).

My point here is not whether the Chairman is right or wrong, or even whether he (or the Committee) is credible as a spokesperson for the imprisoned poor. Rather, it is that the report is consistent with Gostin's stated philosophy: accept, even advocate, infringing on individual rights (for example, voluntary consent) as long as your intentions (for instance, to improve health status through beneficial research) are good. Dual use of prisoners under this rationale is not only permissible, it is desirable. This seems to be precisely the ethic that is at work in Guantánamo that permits physicians to rationalize force-feeding competent hunger strikers in restraint chairs: dual use of military physicians is justified, even required, to prevent prisoners from "harming themselves."

V. GUANTÁNAMO HUNGER STRIKES AND EXPERIMENTATION

Even if the IOM Committee wanted to avoid any criticism of the Bush Administration's anti-human rights prison policies, it should have at least examined the military's suppression of a mass hunger strike at Guantánamo in early 2005. The U.S. military adopted a novel strategy of using a "restraint chair" to break a mass hunger strike by placing hunger strikers in eight point restraints and then forcing a nasogastric tube up their nose and down their esophagus.[34] This basic technique had been labeled torture by the President's Bioethics Council—albeit when done to prisoners in the Soviet Union using a straightjacket instead of a restraint chair.[35] But even if not considered torture, it seems correct to me to label it as a form of human experimentation since this "medical device" (the restraint chair) had never been used for the purpose of breaking a mass hunger strike before, and the U.S. military was "studying" it to see if it was safe and effective.[36]

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[34] *See* Letter from The Center for Constitutional Rights (CCR) The International Federation for Human Rights (FIDH) The European Center for Constitutional and Human Rights (ECCHR) Appeal for Justice National Litigation Project, Allard K. Lowenstein International Human Rights Clinic, Yale Law School (NLP) to Mr. Manfred Nowak, United Nations Special Rapporteur,

Mr. Anand Grover, United Nations Special Rapporteur, and Martin Scheinin, United Nations Special Rapporteur (Apr. 2, 2009), *available at* http://ccrjustice.org/files/Formal%20Communication%20Craddock%20April%202,%202009.pdf.

[35] *See* George J. Annas, *The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights*, 19 MINN. J.L. SCI. & TECH. 19 (2009).

[36] ANNAS, *supra* note 3. Even if one rejects the notion of a medical experiment in this context, the military's primary justification for using the restraint chairs—that they are following a protocol used by the federal Bureau of Prisons—would seem to make the subject of off-shore prisons especially relevant for the Committee's study, i.e. in asking the question regarding which rules should apply to medical treatment and research in these prisons. *See also* Vincent Iacopino, Scott Allen & Allen Keller, *Bad Science Used to Support Torture and Human Experimentation*, 331 SCIENCE 34 (2011).

The argument that the procedures followed , whether research or discipline, at Guantánamo are irrelevant to what goes on in U.S. mainland prisons is not persuasive. Levy, who visited six American prisons in the footsteps of Tocqueville, again helps give us perspective. Reflecting on his visit to Guantánamo near the end of his U.S. journey, he writes:

> You can argue about whether or not Guantanamo should be closed . . . . What you cannot possibly say is that *Guantanamo* is a UFO, fallen from some unknown, obscure disaster. What you are bound to recognize is that it *is a miniature, a condensation, of the entire American prison system*.[37]

Levy seems correct. One could go even further and argue that the "supermax" prisons in the United States violate basic international human rights. This argument is currently being made to the European Court of Human Rights—but, of course, international human rights apply in U.S. prisons only insofar as they are consistent with the U.S. Constitution and the Eighth Amendment.[38] Nonetheless, it should be of great interest that almost simultaneously with the large Guantánamo 2005 hunger strike, there was a coordinated hunger strike at the federal supermax prison in Florence, Colorado by the convicted al-Qaeda terrorists being held there.[39] Because almost no information ever gets out of supermax prisons, we know virtually nothing about this hunger strike, except that unlike Guantánamo it was "successful" in that the convicted terrorists were transferred from high security detention.[40]

The newest Justice on the U.S. Supreme Court, Justice Sonia Sotomayor, can be viewed as the Justice most concerned with prisoners' rights. In 2010, there were only seven occasions in which any Justice wrote a dis-

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[37] Levy, *supra* note 9, at 227 (emphasis added).

[38] Jean Casella and James Ridgeway, *U.S. Supermax Prisons are Challenged in the European Court of Human Rights—and Lose the First Round*, SOLITARYWATCH, July 8, 2010. *See also* Atul Gawande, *Hellhole: The United States hold tens of thousands of inmates in long-term solitary confinement. Is this torture?*, NEW YORKER, Mar. 30, 2009.

[39] Joby Warrick and Peter Finn, *'06 Memo cites Food Strike by Detainees*, WASH. POST, Aug. 28, 2009, at A03.

[40] Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, for John A. Rizzo, Acting General Counsel, Central Intelligence Agency Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities, 13 n.11 (Aug. 31, 2006) ("Together, the terrorists orchestrated the beginning of their hunger strike and developed a sophisticated method to resist compulsory feeding. Ultimately, due to this coordination, the [al-Qaeda] terrorists succeeded in gaining transfer from high security detention."). The U.S. Bureau of Prisons is also in the process of formalizing the institutionalization of "mini-Guantanamos" in federal prisons, Dept of Justice, Proposed Rule: Communication Management Units, 75 Fed. Reg. 17324 (Apr. 6, 2010), and Alia Malek, *Gitmo in the Heartland: Inside the secret, mostly Muslim prisons that ban virtually all contact with the outside world*, THE NATION, Mar. 28, 2011, 17–20 (discussing prototypes established at Marion, Illinois and Terre Haute, Inidana federal prisons).

sent to the Court's refusal to hear a case and she wrote three of them—more than any other Justice—and all were about the rights of criminal defendants or prisoners.[41] The most important one involved a Louisiana prisoner, Anthony C. Pitre, an AIDS patient, who stopped taking his antiretroviral medication to protest his transfer to another prison.[42] In response, prison officials assigned him to perform hard labor in one-hundred degree heat—labor that caused him to collapse and require emergency treatment.[43] The prison physician, nevertheless, approved the hard labor punishment as a reasonable way to get him to change his mind and go back to taking his medications.[44] A lower court also approved of the punishment, saying that the prisoner could stop it at any time by taking his medications voluntarily.[45] In Sotomayor's view, the Court should have at least heard his appeal because, as she saw it,

> Pitre'sdecision to refuse medication may have been foolish and caused a significant part of his pain. But that decision does not give prison official license to exacerbate Pitre's condition further as a means of punishing or coercing him—just as a prisoner's disruptive conduct does not permit prison officials to punish the prisoner by handcuffing him to a hitching post.[46]

Of course, a completely analogous punishment is ongoing at Guantánamo, where prisoners are force-fed in restraint chairs as punishment for refusing to eat, and the rationale can also be that they can stop this punishment at any time by their own action of starting to eat again. It is also of note that military officials at Guantánamo and in the Pentagon have also rationalized their force-feeding behavior by saying that the Standard Operating Procedure in hunger strikes is based on the U.S. Bureau of Prisoner hunger strike regulations.[47] While I have in the past argued that this was not accurate—given that in the U.S. prison all decisions about force-feeding are to be made solely by the prison physician on the basis of the prisoner's health needs, and the prisoner has been tried, convicted of a crime, and sen-

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41 Adam Liptak, *Sotomayor Guides Court's Liberal Wing*, N.Y. TIMES, Dec. 28, 2010, at A10. See the following cases for a more in depth reading of the subject matter for which Justice Sotomayor wrote dissents as a result of the Court's denial of certiorari. Gamache v. California, *cert. denied*, 131 S. Ct. 591 (2010) (Sotomayor, J., dissenting); Pitre v. Cain, *cert. denied*, 131 S. Ct. 8 (2010) (Sotomayor, J., dissenting); Williams v. Hobbs, *cert. denied*, 131 S. Ct. 558 (2010) (Sotomayor, J., dissenting).

42 Pitre, 131 S. Ct. at 8.

43 *Id.*

44 *Id.* at 9.

45 *Id.* at 8.

46 *Id.* at 9.

47 28 C.F.R. § 549.60 (1994).

tenced, and continues to have access to an attorney—these are all differences without a distinction if the prison physician is willing to force-feed a competent prisoner.[48] Unfortunately, as the case of William Coleman in Connecticut illustrates, this can be the case.[49] It should nonetheless be underlined that although the method of breaking hunger strikes by using restraint chairs has also been adopted in the U.S. prison system, there is no prison hunger strike on record anywhere in the world of the length (sometimes years) that some Guantánamo prisons have refused to eat.

In addition, while not available to the IOM Committee, the treatment of an American soldier in a U.S. mainland military prison confirms the similarities with Guantánamo. As is now well-known, the first set of classified Standard Operating Procedures at Guantánamo, including instructions on how to halt a hunger strike, were posted on the Internet by WikiLeaks in 2007.[50] WikiLeaks later became seen as a much more direct threat to American security when it posted a large batch of internal U.S. government documents in 2010.[51] These documents were thought to have been provided to WikiLeaks by an active duty U.S. soldier, Private First Class (Pfc) Bradley E. Manning.[52] Manning was arrested in May 2010 and has since been held in solitary confinement in a Marine Corps jail cell.[53] He is said to be stripped naked every night, forced to stand at attention naked, and sleeps in a "suicide-proof smock" under constant suicide-watch.[54] The military psychiatrist asked to determine whether or not Manning was suicidal or likely to hurt himself, originally determined that he was.[55] But in January 2011, the psychiatrist withdrew his suicide-watch recommendation, saying Man-

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[48] *See* ANNAS, *supra* note 8, 60–70.

[49] Lantz v. Coleman, 978 A.2d 164 (Conn. 2008) (finding that the state can force-feed an inmate engaged in a hunger strike).

[50] Julian Assange et al., *Changes in Guantanamo Bay SOP Manual (2003–2004)*, WIKILEAKS (Dec. 3, 2007) http://mirror.wikileaks.info/wiki/Changes_in_Guantanamo_Bay_SOP_manual_(2003-2004)/.

[51] *U.S. Says Wikileaks Could "Threaten National Security"*, BBC (July 26, 2010), http://www.bbc.co.uk/news/world-us-canada-10758578. *See generally*, DAVID LEIGH & LUKE HARDING, WIKILEAKS: INSIDE JULIAN ASSANGE'S WAR ON SECRECY 20–31 (Guardian Books 2011). Wikileaks has continued to disclose "secret" files on the Guantanamo inmates, most recently in April, 2011. Charlie Savage, William Glaberson & Andrew Lehren, *The Guantanamo Files: Details of Lives in an American Limbo*, N.Y. TIMES, Apr. 25, 2011, at A1.

[52] Glenn Greenwald, *The Inhumane Conditions of Bradley Manning's Detention*, SALON.COM (Dec. 15, 2010), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/14/manning.

[53] Scott Shane, *Obama Defends Detention Conditions for Soldier Accused in WikiLeaks Case*, N.Y. TIMES, Mar. 11, 2011, *available at* http://www.nytimes.com/2011/03/12/us/12manning.html?_r=2&adxnnl=1&ref=us&adxnnlx=1300897015CixgPKMtCgu5R15v+NJEDw.

[54] *Id.*

[55] *Id.*

ning was actually a "low risk" prisoner.[56] In this case, the military physician seems to have successfully resisted being used for security purposes. The case of Pfc. Manning is ongoing, and even President Obama had to comment on it after the State Department's top spokesperson, Philip J. Crowley, called Manning's treatment "ridiculous, counterproductive and stupid."[57] Obama's unsatisfactory response could have been provided by President George Bush. Obama said he asked the Pentagon whether the procedures being used to confine Manning "are appropriate and are meeting our basic standards [and] [t]hey assure me that they are."[58] Put another way, Guantánamo standards are consistent with U.S. "basic standards." And, of course, to the extent that President Obama adopts the approaches to the "war on terror" first implemented by President George W. Bush, these approaches become official U.S. policy rather than a one-president aberration.

VI. INTERNAL INCONSISTENCIES

Just as Americans and Supreme Court Justices (but not Presidents) are often of two minds in comparing Guantánamo to the U.S. prison system in general, the IOM was of two minds in applying the core doctrine of informed consent to research on American prisoners (it obviously has had no application to the hunger strike response at Guantánamo, but is, of course, critical to the WMA's hunger strike ethics policy). A central example is the IOM Committee's view of the Nuremberg Code and the Code's insistence on informed consent. The American judges at Nuremberg did make informed consent of prisoner research subjects their number one item in the Nuremberg Code, but that was not the end of it.[59] The judges, looking forward, also insisted that although informed consent is necessary, it is never

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[56] *Id.*

[57] *Id.*; After making this statement, the spokesman resigned two days later. Jeffrey Young, *State Department's Philip J. Crowley Resigns, Citing WikiLeaks Comments*, BLOOMBERG (Mar. 14, 2011, 12:00 AM), http://www.bloomberg.com/news/2011-03-13/state-department-s-crowley-quits-citing-wikileaks-comments-1-.html.

[58] Shane, *supra* note 53; Farah Stockman, *State Dept. Spokesman Quits Over Remarks*, BOSTON GLOBE, Mar. 14, 2011, *available at* http://www.boston.com/news/nation/washington/articles/2011/03/14/state_dept_spokesman_quits_over_remarks/; Obama has since faced Bradly Manning protestors, even at a very high end fundraiser in California. *See* Jackie Calmes & Brooks Barnes, *Obama Makes His Case in Mostly Friendly Territory*, N.Y. TIMES, Apr. 22, 2011, at A15. Obama also accepted at face value a very shallow report on conditions at Guantanamo conducted shortly after he became president. *See* Len Rubenstein & George Annas, *Medical Ethics at Guantanamo Bay Detention Centre and in the US Military: A Time for Reform*, 374, 9686 LANCET 353 (2009).

[59] National Institute of Health, *Regulations and Ethical Guidelines, Nuremberg Code*, http://ohsr.od.nih.gov/guidelines/nuremberg.html (last visited Apr. 14, 2011).

sufficient—there are nine additional requirements for legal and ethical research in the ten-point Nuremberg Code.[60]

The Nuremberg Code insists that consent be "voluntary, competent, informed and understanding."[61] In the prison context, of course, the primary issue is voluntariness, as the Committee recognized.[62] Nonetheless, instead of thinking hard about how consent might be judged to be voluntary in the prison context, the Committee spends almost an entire chapter in the report denigrating consent as a meaningful or useful protection against the exploitation of human subjects.[63] Paradoxically, in the next and final chapter of the report, "Systems of Oversight, Safeguards, and Protections," the Committee sets forth a ringing endorsement of the consent requirement of the Nuremberg Code:

> Recommendation 6.1. *Ensure voluntary informed consent. Human research participant protection programs should ensure voluntary informed consent is obtained from subjects in all research involving prisoners.*[64]

This recommendation, which is also consistent with the WMA's 2006 position on care for hunger striking prisoners, is directly on target. The Committee is to be merits commendation for its insights on informed consent, which are worth quoting at some length:

> *Informed consent is vital to autonomous decision making and respect for persons* and is considered a bedrock of ethical research—whether it involves prisoners or non-prisoners. Informed consent is an interactive and ongoing process . . . . The written consent form—one part of the process—is the mechanism for documenting that communication with the participants regarding relevant considerations to enrollment in a protocol has taken place. *The informed consent process must help the prisoner to exercise autonomous decision making*. The process poses special challenges in the correctional setting, where autonomy may be inconsistent with institu-

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60 *Id.*

61 *Id.*

62 *Id.*

63 Specifically, the Committee makes the following arguments in Chapter 5. ETHICAL CONSIDERATIONS, *supra* note 17. "Recent scholarship has questioned the myopia caused by such a narrow focus [on informed consent]"; "There seems to be agreement from a variety of perspectives that informed consent forms have consumed too much time and energy"; "A more fundamental question is whether too much weight has been placed on informed consent"; "These questions about undue focus on informed consent influence our recommendations" ; The ethical risks associated with research involving prisoners cannot be solved by focusing only on the informed consent document"; and " . . . the myopic emphasis on informed consent . . . ." *Id.* at 117–122. These statements, which mainly conflate the doctrine of informed consent with an "informed consent document" seem to be the prelude to jettisoning or at least marginalizing the role of informed consent in prison research. *Id.*

64 *Id.* at 147 (emphasis added).

> tional order and judicially imposed limitations on liberty . . . . There is no question that, within correctional settings, it is more difficult to provide integrity to the process of informed consent, but this does not remove the obligation. *If it is determined that voluntary informed consent is not obtainable, then a research protocol should not go forward*.[65]

The centrality of prisoner autonomy to the doctor-patient relationship is, of course, also the foundational rationale for the WMA's insistence that prison physicians not force-feed competent hunger strikers. Only the informed consent of a competent prisoner can justify a physician to provide treatment (or engage in research), including "physician-assisted" feeding.

VII. JUSTICE AND PRISON RESEARCH REGULATIONS

There are other examples of inconsistencies in the IOM report that induce vertigo. The report begins by underlining in its preface that "The charge of our Committee . . . was to explore whether the conclusions reached in 1976 by the National Commission . . . remain appropriate today."[66] Nonetheless, in the one-hundred and seventy-four pages that follow, virtually no attempt is made to address this charge. The 1976 report, for example, is never analyzed. My colleagues Leonard Glantz and Barbara Katz and I wrote the informed consent background paper for the National Commission's prisoners report, which covered—in much more detail than

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[65] *Id.* at 147–48 (emphasis added). This paragraph is preceded by another that describes a visit by the IOM committee to "one prison and one prison medical facility" at which, we are told, "The prisoners actively expressed the desire to have access to research . . . [and] echoed the sentiment that prisoners possess sufficient autonomy to make informed decisions about whether to participate in a given study." *Id.* at 122. This description is clarified further in a footnote: "Of course, this survey only represents the views of a limited sample of prisoners." *Id.* Of course, no valid conclusions can be drawn from these "unstructured discussions." This description matters because the IOM committee immediately follows it with a conclusion designed to marginalize the importance of consent: "This, combined with the myopic emphasis on informed consent, is why the current categorical regulatory approach should be abandoned in favor of a risk-benefit paradigm." *Id.* In this regard, it is worth noting, as the IOM committee did not, what followed from the parallel paragraph cited by the committee above, in the National Commission's own report of their actual study of prisoners (a representative sample of eighty prisoners) at Jackson:

> Participants gave many reasons for volunteering for research, including better living conditions, need for a good medical evaluation, and desire to perform a worthwhile service to others, but it was clear that the overriding motivation was the money they received for participating. In fact their strongest objection was that the pay for participation in research was held down to levels comparable to prison industries.

NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, RESEARCH INVOLVING PRISONERS: REPORT AND RECOMMENDATIONS 35–36 (1976). *See also* Obasogie, *supra* note 18, at 49–57.

[66] *See* ETHICAL CONSIDERATIONS, *supra* note 17, at ix.

the IOM report—the issues of voluntariness, including the meaning of coercion and undue influence in the prison setting, as well as detailed discussions contrasting behavioral research from biomedical research.[67] The point is not that the Committee did not read our background paper; the Committee does not seem to have read *any* of the fifteen background papers or the four staff papers and reports that were prepared for the National Commission on the subject of research involving prisoners.[68]

One can conclude, as the National Commission did, that it is possible to do ethical research in prisons, without concluding either that emphasis on consent is "myopic" (both the IOM and National Commission discussions with prisoners actually support the opposite conclusion), or that we should approve of research simply because prisoners want it. Neither conclusion follows. Prisoners support informed consent as much as ethicists do; and what prisoners want most, including, and perhaps especially those at Guantánamo who have no release date, is not to be research subjects, or to be on a hunger strike, but to be out of prison.

This suggests another vertigo-inducing problem in the IOM report (and at Guantánamo): the conclusion that we should focus more on "justice" (the procedural task of weighing risks versus benefits) than "consent" (the substantive rule of prisoner self-determination) in prison research. Committee member Jonathan Moreno wrote about this issue in a book cited by the Committee for this proposition.[69] But the Committee's incoherent emphasis on procedural "cost/benefit justice"[70] in this context cannot be attributed to him. As Moreno concludes:

> Generalized discussions about justice are sorely limited concerning specific groups . . . . The respective situations of prisoners, institutionalized persons, military personnel, and students are quite different and require analyses tailored to each of them. Underlying all these cases are complex issues of social status and power as well as medical ethics.[71]

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[67] *See generally* G.J. Annas, L.H. Glantz & B.F. Katz, *The Law of Informed Consent in Human Experimentation: Prisoners, in Research Involving Prisoners: Appendix to Report and Recommendations* 7-1–7-60 (1976), *in* INFORMED CONSENT TO HUMAN EXPERIMENTATION: THE SUBJECT'S DILEMMA 1–55 (1977).

[68] *See generally* ETHICAL CONSIDERATIONS, *supra* note 17.

[69] J.D. Moreno, *Convenient and Captive Populations in* J.P. KAHN, A.C. MASTROIANNI, J. SUGARMAN, BEYOND CONSENT: SEEKING JUSTICE IN RESEARCH 111–130 (New York: Oxford U. Press, 1998).

[70] *See* ETHICAL CONSIDERATIONS, *supra* note 17, at 65–66. Justice in the "justice system" is primarily about how we got to the point where so many Americans are in prison in the first place; this issue is also critical at Guántanamo where fewer than ten percent of the prisoners there were captured by U.S. troops—instead, they were turned in by bounty hunters.

[71] ETHICAL CONSIDERATIONS, *supra* note 17, at 126.

Moreno seems correct here, and these justice considerations are central to the Committee's conclusion, that some studies would simply not be allowable under the Committee's "risk-benefit analysis." Specifically, in the Committee's words:

> The potential benefit of an experimental intervention must be established before engaging in a risk-benefit analysis. As such, phase l and phase 2 studies, as defined by the FDA to determine safety and toxicity levels, would not be allowable. . .only phase 3 studies would be allowed [in prisons].[72]

This seems clear enough. Thus, it is at least surprising that in the very next chapter the most controversial example of a study that the Committee believes should be able to be done under its new ethical framework is "[a] phase l study of a medication [that] may reduce repetitive sexual assaults."[73] The Committee at least realizes that this study would not be justifiable under its risk-benefit framework, and so suggests it as an exception that is "necessary as there are no alternative candidate research populations to draw from."[74] But repetitive sexual assault is hardly a unique problem of prisoners, and the prison sample is skewed, representing as it does only those who got caught by the criminal justice system. In Moreno's terms, such subjects seem to be mostly targeted because they are "captive and convenient" rather than the most scientifically relevant. This again is consistent with the Guantánamo prisoners where actions taken against them are justi-

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[72] *Id.* at 127. The committee seems to have convinced itself both that there are studies (other than studies of prison conditions and their effect on prisoners) that can only be done on prisoners, and that current regulations prohibit such studies. But nowhere in their report are either of these conclusions validated. With the possible exception of this phase one study and example nine (comparing two drugs for impulse control disorders), all of the other twelve examples described in chapter 6 are approvable under the current prison regulations. This leads readers to wonder exactly what the problem is that the committee's recommendations, vague as they are, are designed to solve.

[73] *See* ETHICAL CONSIDERATIONS, *supra* note 17, at 167. The only specific comment on the National Commission's own report occurs at pages 121 and 122 of the IOM report:

> The original commissioners [i.e. members of the National Commission] talked to actual prisoner-subjects during a fact finding visit to Jackson State Prison on November 14, 1975. The prison, in southern Michigan, was at the time home to one of the largest nontherapeutic biomedical research programs in the country . . . The commission members spoke with a representative sample of research participants and nonparticipants selected by commission staff from a master list of all prisoners and found that, overall, participants valued the opportunity to participate in research and felt they were sufficiently informed and free to enroll and withdraw at will, and nonparticipants did not object to this opportunity being available to others.

See id. at 121–2. *See also* Obasogie, *supra* note 18, at 62–71 (describing the lack of empirical data in the IOM).

[74] ETHICAL CONSIDERATIONS, *supra* note 17, at 167.

fied primarily because they are "captive," and the only effective way they have to protest their confinement is by going on a hunger strike. The "justice" justification for force-feeding them is the military's weighing of risks and benefits to their health of not eating; the justice of their confinement is never addressed.

VIII. CONCLUSION

A contemporary report on the ethics of prisoner research, including "research" on breaking prison hunger strikes, has yet to be written. The IOM report will survive mostly as a relic of the Bush Administration because it identified no real problem to address, both expanded and contracted the definition of prisoners, ignored the context of the global war on terror and international law, and failed to develop either a consistent ethical framework or a draft of recommended changes in statutory or regulatory law. Nonetheless, it can help us understand what is happening at Guantánamo, and why it is accurate to see Guantánamo as a mirror of official U.S. prison policy and practice, not an exception or aberration. Dual use of physicians in prisons has a formidable pedigree in the United States, and the only "solution" to it is for prison physicians to refuse to comply with any order or request from prison officials, including military commanders in charge of military prisons, that is inconsistent with medical ethics. Such orders should also be explicitly labeled "unlawful" orders by the U.S. Department of Defense. Military physicians should no more be expected to violate medical ethics than military lawyers should be expected to violate the U.S. Constitution, or than military chaplains should be expected to violate the tenets of their religions. Military physicians should not, however, be expected to do this alone; medical professional organizations, state licensing boards, and the public all have a stake in the medical profession and all should actively support physicians who take medical ethics seriously. This is one reason (patient health is another) why military and prison physicians should be able to call in independent civilian medical consultants as they see fit.

The IOM Committee was right to quote an observation usually attributed to Dostoyevsky, although it is impossible to identify where the author actually wrote these words: "The degree of civilization in a society can be judged by entering its prisons." In the case of the United States, those prisons have names, including Abu Ghraib and Guantánamo. And our civilization deserves to be judged by our fidelity to international human rights law and medical ethics practice as reflected in those prisons. We cannot credibly reform Guantánamo alone; we must reform our entire prison system, especially our system of prison healthcare, of which Guantánamo is just a reflection. In commenting about his visit to Alcatraz, Levy could have been making an observation about Guantánamo and the Marine Corp brig holding Private Bradley Manning: "No escapees from Alcatraz. Just the

damned of Alcatraz. And perhaps, beyond Alcatraz, a whole segment of the American penal system [modeled on the leper colony]."[75]

[75] Levy, *supra* note 9, at 167.