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AMERICAN INNOCENCE

Robert N. Strassfeld[†]

"[I]t is unpleasant for Americans to see that some citizens, some soldiers have acted this way, because . . . it doesn't reflect how we think. This is not America."¹

What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture We are then lost and undone.²

I. INTRODUCTION

One of my earliest enduring memories of the Vietnam War is of torture. Thankfully, my memories come not from first-hand experiences, but from a photo essay published by *Life Magazine* in June 1964. Nevertheless,

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¹ Interview by Alhurra Television with President George W. Bush, 40 WEEKLY COMP. PRES. DOC. 786, 787 (May 10, 2004), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004_presidential_documents&docid=pd10my04_txt-20.pdf.

² 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 447-48 (Jonathan Elliott ed., 2d ed. 1941) (1836) [hereinafter DEBATES] (quoting Patrick Henry).

the pictures and text produced memories that are vivid, powerful, and lasting. Under what would prove to be an overly optimistic title, *A Little War, Far Away—And Very Ugly*, the text and photographs presented a grim picture.³ Japanese photojournalist Akihiko Okamura was unflinching in his depiction of the misery and death that he saw.

A portion of the essay involved a combat mission of a South Vietnamese ("Army of the Republic of Viet Nam" or "ARVN") military unit near the Cambodian border. After a helicopter bombardment of a South Vietnamese village, the ARVN soldiers were airlifted to the village, where they met no resistance.⁴ Initially finding only women, children, and older men, they eventually flushed out forty-three military-aged men, whom they assumed to be guerillas.⁵ Over Okamura's protests, hours of interrogation followed.⁶ The text and Okamura's photographs depict ARVN soldiers beating and kicking the "guerillas."⁷ They placed the prisoners in uncomfortable stress positions: they were "jackknifed into positions of agony."⁸ The ARVN soldiers also employed various water torture techniques. They held prisoners under water in the nearby river, or put rags on the prisoners' faces and then poured water on the rags to create the sensation of drowning.⁹ Elsewhere Okamura described the torture in greater detail and the account is, as one would expect, chilling and disturbing.¹⁰ Okamura did not

³ *A Little War, Far Away—And Very Ugly*, LIFE, June 12, 1964, at 34 [hereinafter LIFE] (photographed by Akihiko Okamura).

⁴ *Id.* at 39.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See AKIHIKO OKAMURA, MINAMI VETONAMU SENSO JUGUNKI: ZEN (1990) (Japan). Okamura recounts, for instance:

Drenched clothes cling to the body of a young peasant villager of only 18 or 19 years-old who has been forced down to the ground and is lying face up with his hands bound behind his back. He can't breathe. His nose and mouth twitch convulsively under a cloth gag. A government soldier trickles water over his face. A strained scream comes from deep within the villager's throat as he struggles to move his lower body to escape the life-threatening torture with his legs kicking towards the upper body of the soldier. "He's a big one! Hold him down. He's too strong for us. Use the pole to choke him!" An officer standing next to them with a military map in his left hand and a bamboo cane in his right hand gives detailed orders. This Catholic captain, who came from the North to the South after the Geneva Accords were signed, maintains a stoic expression on his face while looking down at his captured prey

The torture continues for over an hour under the broiling sun. An experienced non-commissioned officer squats down near the ear of the villager who can hardly breathe. The villager's face is hidden by the cloth covering it. I wonder how the

have the benefit of the Bybee Memorandum,¹¹ of recent U.S. Department of Defense memoranda delineating permissible interrogation techniques,¹² nor of Central Intelligence Agency (“CIA”) Director Porter Goss’ assurance that such techniques are merely “professional interrogation.”¹³ Thus unenlightened, Okamura had no trouble recognizing the acts he photographed as “torture.”¹⁴

As a nine-year old, waiting in my pediatrician’s office for an allergy shot to help me cope with asthma, I focused especially on the water torture. I understood the panic that comes with the struggle to catch an adequate

villager feels as he listens to the officer. “Come on, tell us. Where are the weapons hidden? Who is the Vietcong contact for this village?” However, the villager remains silent. He replies by wriggling his body and trying to kick the soldiers. “Damn it! Arrgh!” Six soldiers spring like locusts and pin the villager down by his arms and legs. A pole that has been brought over is placed over the villager’s soft throat. The officer gives an ultimatum to the villager, “Okay, if you don’t talk, you’re going to die!” Unable to bear any more, the villager’s mother, who had been praying for her son in her home next door, rushes barefoot out to where her son is. A soldier holding a gun instantly responds and pushes the frail woman back into a corner of her home.

Id. Spence Zaorski provided an English translation of a portion of Okamura’s Japanese book especially for this article.

¹¹ Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 115, 117-26 (2004) [hereinafter Bybee Memorandum].

¹² Memorandum from Jerald Phifer, Dir, J2 to Michael E. Dunlavey, Commander, Joint Task Force 170, U.S. Dep’t of Def., Request for Approval of Counter-Resistance Strategies (Oct. 11, 2001), *reprinted in* DANNER, *supra* note 11, at 167 (approving the “use of stress positions (like standing), for a maximum of four hours” and limiting, but not absolutely prohibiting the “[u]se of a wet towel and dripping water to induce the misperception of suffocation”); Memorandum from Diane E. Beaver, Staff Judge Advocate to Michael E. Dunlavey, Commander, Joint Task Force 170, U.S. Dep’t of Def., Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2001), *reprinted in* DANNER, *supra* note 11, at 170, 176-7 (“The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would.”); Memorandum from William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. to Donald Rumsfeld, Sec’y of Def., U.S. Dep’t of Def., Counter-Resistance Techniques (Nov. 27, 2002), *reprinted in* DANNER, *supra* note 11, at 181 (recommending that Secretary of Defense Donald Rumsfeld approve the use of various interrogation techniques including stress positions, though not simulated suffocation with wet towels). A reproduction of the Haynes memorandum, with Rumsfeld’s approval and comment that “I stand for 8-10 hours a day. Why is standing limited to 4 hours?” is available at, http://www.humanrightsfirst.org/us_law/etn/pdf/dod-memos-120202.pdf (last visited Mar. 23, 2006).

¹³ Douglas Jehl, *Questions Left By C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1.

¹⁴ LIFE, *supra* note 3, at 38-39.

breath. Upon recently returning to the photographs, I find myself wondering about two questions that escaped my attention at the time. First, why was there no strong reaction to these photographs? There was hardly a ripple in the letters to the editor section in the weeks that followed. Second, and more important, though, perhaps, related, where are the Americans?

May 1964, when the mission depicted occurred, was during what has come to be known as the advisory period of the war. America's military presence in South Vietnam was still relatively small. Officially, our involvement was limited largely to the assistance of American advisors attached to the ARVN forces.¹⁵ Elsewhere in the essay, we learn about American advisors to ARVN forces.¹⁶ We know that many ARVN units at the time were accompanied by American advisors.¹⁷ Did an American advisor accompany the ARVN troops on this mission? If so, where was he when the torture began? Did he, as happened in so many veteran accounts from that war, go off to have a cigarette, or given the duration of the interrogation, a pack of cigarettes, at the ARVN commander's suggestion?¹⁸ We also know that the ARVN forces were transported to and from the village by helicopter.¹⁹ At the time, while there were ARVN helicopter units in Vietnam, the likelihood that ARVN pilots rather than U.S. pilots were involved in the mission is remote, at best.²⁰ Did American helicopter pilots land from time to time during the interrogation to resupply the ARVN troops? We do know from Okamura's account of his experiences in Vietnam that after an unsuccessful interrogation, the forty-three prisoners were transported on American helicopters to a military area in the rear.²¹ What did the American helicopter crews make of their beaten and damaged passengers and what of the reception that they met when deposited in the rear, doubtless for a continuation of their interrogation? Were they shocked by what they saw, or had they seen it all before? Certainly, the American officer who joined Okamura at the base camp's officer's club, where he tried to drink the im-

¹⁵ GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975* 94-100, 130-33 (3d. ed. 1996).

¹⁶ LIFE, *supra* note 3, at 40-44.

¹⁷ HERRING, *supra* note 15, at 95-98.

¹⁸ See, e.g., Robert Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839, 915 (1994) (recounting the court-martial testimony of Donald Duncan and Robin Moore regarding the typical American response to acts of torture committed by their South Vietnamese counterparts).

¹⁹ LIFE, *supra* note 3, at 39, 44a-44c.

²⁰ At the time, there were few South Vietnamese helicopter pilots, and they were poorly trained. Several U.S. Marine and Army helicopter units were in Vietnam for this sort of duty. My intuitions are shared by Professor George Herring who suggested that the most one would see in 1964 is an ARVN trainee flying with an American helicopter pilot. Conversation with George Herring, Professor Emeritus, Univ. of Ky. (Jan. 24, 2006).

²¹ OKAMURA, *supra* note 10, at 228.

ages away later that night, did not seem surprised as he toasted Okamura's scoop and said: "War is meaningless."²² What, in other words, was the relationship between Americans in Vietnam and the practice of torture by ARVN forces? Was it awareness, accommodation, acquiescence, or encouragement? Did we see these acts as a beneficial evil? To what degree were we implicated in these acts?

I do not know whether then young George W. Bush saw the photographs in *Life Magazine*, let alone what questions he may have pondered if he did. It seems unlikely to me that if he did see the pictures, he would have troubled himself much with the question: where are the Americans? After all, in response to publication of the Abu Ghraib photographs and accounts of prisoner abuse that went on there, he tried to reassure America and the world that "[t]his is not America."²³ And, indeed, to varying degrees, I suspect we all found ourselves thinking that—and would have been even more prone to think that way in 1964.

It is useful to think about extraordinary rendition as part of a larger story about how Americans have seen their relationship to torture and to other wartime atrocity. That relationship, and our self-perception, has been complicated. Sometimes the ferocity of our rhetoric has been shocking, and we have been quite sanguine in embracing the brutality of war. At times, including, I believe, today, we have characterized the wars we fight as "savage wars," fought against an enemy that we see as peculiarly barbaric and bent on extermination to whom, we say, we must respond in kind.

More typically, however, we think of our relationship to torture and atrocity very differently. We have a hard time seeing ourselves in the pictures from Abu Ghraib, or imagining ourselves as the perpetrators of torture, abuse, and other atrocities in the more hidden corners of the world that have not been penetrated by digital cameras. The grinning face of Lyndie England, is not, we tell ourselves, the face of America. This flight from the unseemly side of American warfare is not new. The predominant theme in our thinking about our place in the world has been one of American exceptionalism and American innocence.²⁴ To be sure, this image is not an altogether flattering one. As I will suggest later on, "innocence" connotes both blamelessness and naiveté. Yet, I believe it is the more positive version of this

²² *Id.*

²³ Interview by Alhurra Television with President George W. Bush, *supra* note 1, at 787.

²⁴ One should, of course, venture cautiously when suggesting that Americans agree on a master narrative about ourselves. Surely, differences of gender, race, ethnicity, class, and experience militate against any consensus. Most recently, the divisions within the U.S. regarding the Iraq War suggest that a strong counter narrative exists. Nevertheless, with the caveat that these notions of American exceptionalism and American innocence do not enjoy unqualified universal acceptance, it is fair to say that these themes play a recurring role in how we have depicted ourselves in both popular culture and official proclamation.

image that we usually adopt, and in so doing, we cloud our self-perception, sometimes to the point of self-delusion.

The sad fact is that our relationship to torture and other atrocities is more complicated and less innocent than we or President Bush would like to believe. This article examines that relationship and the ways in which we try to distance ourselves from torture and atrocity. Part II briefly explores our notions of exceptionalism and innocence. Part III then turns to our efforts to evade responsibility for torture and atrocity. First, it briefly discusses ways in which we try to deny our own acts of torture and abuse through rhetorical misdirection and by relegating torture to the shadows. Part III's primary focus, however, is on our practice of "othering" torture, and on extraordinary rendition as an instantiation of that practice. The second portion of Part III looks at instances where we have taken advantage of a division of labor in which others act as our torturers, or at least torture with our knowledge and acquiescence, and it situates extraordinary rendition in that practice. Finally, it looks at some of the consequences of othering torture. Part IV takes up the theme of innocence, once again. It is commonplace to hear these days that America "lost its innocence" on September 11, 2001. Part IV briefly examines this notion of loss of innocence.

II. A NEW ADAM IN A NEW WORLD

*Our age is retrospective. It builds the sepulchres of the fathers. It writes biographies, histories, and criticism. The foregoing generations beheld God and nature face to face; we, through their eyes. Why should not we also enjoy an original relation to the universe? . . . [W]hy should we grope among the dry bones of the past? . . . There are new lands, new men, new thoughts. Let us demand our own works and laws and worship.*²⁵

From early in our history, America has known war and the atrocious acts that accompany it. Those experiences have colored our understanding of ourselves in times of peace and war. So too, has our sense of America as a place for new beginnings, a new Eden. Both of these aspects of our collective self-image have contributed to the way we think about our relationship to torture and atrocity.

As Richard Slotkin, Richard Drinnon, and John Hellmann have so ably described, we have often drawn on frontier myths, including myths of western gunfighters and "savage Indians," in understanding our confrontation with other people and other parts of the world, especially when that confrontation is tinged with racial difference.²⁶ Confronted with an enemy

²⁵ Ralph Waldo Emerson, *Nature*, in *SELECTED WRITINGS OF RALPH WALDO EMERSON* 186, 186-87 (William H. Gilman ed., 1965) (1836).

²⁶ See generally RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING* (1980); JOHN HELLMANN, *AMERICAN MYTH AND THE LEGACY OF*

that we characterize as barbaric, we justify the waging of “savage war,” a war whose ultimate logic is not merely defeat, but extermination of the enemy.²⁷ As John Dower has shown in his study of American images of the Japanese and Japanese images of Americans during WWII, there is much projection and self-justification at work when we employ these demonizing myths.²⁸ Confronted with a savage enemy in a non-traditional war, “a new kind of war” we are apt to say, though little is actually new, we look to the unconventional warrior (the frontier hero, or in his modern inception, Special Forces and the CIA), the person who we say knows how to “fight[] like the Indians.”²⁹

We have not always been squeamish about torture. In the aftermath of the Spanish-American War, American imperial aspirations ran into a nationalist insurrection in the newly-conquered Philippines.³⁰ Fueled by a cult of masculinity, Theodore Roosevelt’s call for the strenuous life, and the desire for empire, many Americans embraced the use of torture and other atrocious acts.³¹ Roosevelt explicitly linked the responsibility of Americans to the nation and to “the race” with the imperial program in Cuba, Hawaii, Puerto Rico, and the Philippines, and he derided “those who make a pretense of humanitarianism to hide and cover their timidity, and who cant about ‘liberty’ and the ‘consent of the governed,’ in order to excuse themselves for their unwillingness to play the part of men.”³²

Against this backdrop the rhetoric of pro-war advocates drew on the trope of “savage war” to justify extreme, brutal, and sometimes extermina-

VIETNAM (1986); RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* (1992) [hereinafter *SLOTKIN, GUNFIGHTER NATION*]; RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860* (1973); RICHARD SLOTKIN, *THE FATAL ENVIRONMENT: THE MYTH OF THE FRONTIER IN THE AGE OF INDUSTRIALIZATION 1800-1890* (1985).

²⁷ For a discussion of savage wars, see *SLOTKIN, GUNFIGHTER NATION*, *supra* note 26, at 10-13, 106-22. On the Vietnam War as a savage war, see *Strassfeld*, *supra* note 18, at 915-21.

²⁸ See generally JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* *passim* (1986).

²⁹ Richard Slotkin, *Gunfighters and Green Berets: The Magnificent Seven and the Myth of Counter-Insurgency*, 44 *RADICAL HIST. REV.* 65, 75 (1989).

³⁰ *SLOTKIN*, *supra* note 26, at 106-22. For a discussion of the United States’ policy in the Philippines during this period, see generally LEON WOLFF, *LITTLE BROWN BROTHER: HOW THE UNITED STATES PURCHASED AND PACIFIED THE PHILIPPINE ISLANDS AT THE CENTURY’S TURN* (1961).

³¹ Stuart C. Miller, *Our Mylai of 1900: Americans in the Philippines Insurrection*, *TRANSACTION*, Sept. 1970, at 19; *SLOTKIN*, *supra* note 26, at 106-22.

³² Theodore Roosevelt, Speech before the Hamilton Club: *The Strenuous Life* (Apr. 10, 1899), *reprinted in* THEODORE ROOSEVELT, *THE STRENUOUS LIFE: ESSAYS AND ADDRESSES* 18 (1902).

tionist measures. The war correspondent for the Philadelphia Ledger, for instance, wrote:

The present war is no bloodless, fake, opera bouffe [sic] engagement. Our men have been relentless; have killed to exterminate men, women, children, prisoners and captives, active insurgents and suspected people, from lads of ten and up, an idea prevailing that the Filipino . . . was little better than a dog Our soldiers have pumped salt water into men to "make them talk," have taken prisoner people who . . . peacefully surrendered, and an hour later, without an atom of evidence to show that they were even insurrectos, stood them on a bridge and shot them down one by one, to . . . float down as an example to those who found their bullet-riddled corpses. . . . It is not civilized warfare, but we are not dealing with civilized people. The only thing they know and fear is force, violence, and brutality, and we give it to them.³³

Taking the logic of savage war to its extreme, war correspondent Henry Loomis Nelson argued that the United States must set aside all qualms about cruelty or extermination.³⁴ Loomis wrote: "We exterminated the American Indians, and I guess most of us are proud of it, or, at least, believe the end justified the means; and we must have no scruples about exterminating this other race standing in the way of progress and enlightenment if it is necessary."³⁵ This tough-minded, bloodthirsty rhetoric translated into a brutal reality that included mass killings and torture. Thus, while Roosevelt publicly insisted that only insurgents committed atrocities in the Philippines, privately he welcomed the use of the "water cure,"³⁶ that war's version of waterboarding. Public acknowledgment of our use of the water cure and other "inhuman conduct" came in William Howard Taft's testimony to Congress on the conduct of the war. Then Governor-General of the Philippines, Taft excused these excesses as necessary components of what he deemed a war "between superior and inferior races."³⁷

In contrast to the claim to national adulthood as a world power, just as capable of brutality in the name of empire as our European rivals, we have often presented ourselves as free from the tyrannical tendencies and oppressive behaviors of Europe. Patrick Henry's statements at the Virginia ratifying convention, that he feared that we would adopt European practices

³³ SLOTKIN, GUNFIGHTER NATION, *supra* note 26, at 113 (quoting a correspondent of the Philadelphia Ledger).

³⁴ *Id.* at 112.

³⁵ SLOTKIN, GUNFIGHTER NATION, *supra* note 26, at 112 (quoting Henry Loomis Nelson).

³⁶ *Id.* at 120-21.

³⁷ *Id.* at 120.

of extracting confessions by torture and of inflicting "cruel and barbarous punishment" is but one expression of our collective sense of difference.³⁸

Americans have long seen the American experience as one of new beginnings and an escape from the superstitions, prejudices, and practices of Europe. We have described the United States as a new Eden or a new Israel, and ourselves in Adamic terms. The American, in Crèvecoeur's famous formulation, was a "new man, who acts upon new principles."³⁹ The American was neither of the effete metropolis, nor of the frightening and uncivilized (in Puritan descriptions, Satanic) wilderness. Rather he was a civilizing force in a new land, unblemished by the many faults of the old one. We have cultivated the contrast with Europe. We are a land with no castles or kings. In fleeing Europe, we left behind feudalism and aristocracy, the priestcraft and religious wars. With them, we also rejected the Star Chamber, the rack and the thumbscrew. So, at least, goes part of our national myth.

The power of this notion of American exceptionalism can be seen in its recurrence in our self-descriptions. During the American Renaissance of the 1840s and 1850s, such writers as Emerson and Whitman viewed the American in Adamic terms.⁴⁰ A century later, these images of the American Eden and of the American as a new man who had slipped the bonds and prejudices of Europe informed the consensus school of American history. Such historians as Daniel Boorstin, Louis Hartz, Richard Hofstadter, and David Potter, emphasized American difference and contended that our history was unlike Europe's.⁴¹ The struggles that marked European history were largely missing in the United States, they argued, because class boundaries were fluid and class distinctions were of minor import, because ours was a nation of relative wealth, because there was a broad consensus on basic democratic principles, eliminating the need for many of the epoch struggles in the European past, and because political differences were confined to narrow manageable issues, not the sorts of things over which people would take to the streets and erect barricades, never mind engage in a reign of terror. Reacting to our encounter with European fascism and communism, and to our Cold War anxieties, some of their contemporaries hopefully and prematurely proclaimed "the end of ideology," just as their intellectual descendants would be moved to announce the "end of history"—

³⁸ DEBATES, *supra* note 2, at 447.

³⁹ J. HECTOR ST. JOHN CRÉVECOEUR, LETTERS FROM AN AMERICAN FARMER 50 (Doubleday 1963) (1782).

⁴⁰ See generally R.W.B. LEWIS, THE AMERICAN ADAM 13-53 (1955).

⁴¹ Representative works include, DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1953); LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955); RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (1948); DAVID M. POTTER, PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER (1954).

equally prematurely.⁴² And, of course, notions of American exceptionalism are very much at the core of our current approach to foreign policy, notwithstanding our claims to be participating in the “coalition of the willing.”⁴³

At the center of this idea of the new American is a notion of American innocence. By leaving Europe, Americans, our national story tells us, freed themselves from the corruption of Europe. We were reborn innocent. As I will suggest later on, this image has not always been a flattering one. Innocence can connote both blamelessness and naiveté. Yet, generally, it is the former that we mean when we talk of ourselves in terms of innocence. We are Billy Budd about to have our first experience with evil.

From time to time, our assertions of innocence collide with revelations of not so innocent behavior. In such moments, we may struggle briefly with the contradictions, but, typically, we quickly seek shelter in comforting assertions that what we have seen is the aberration of “a few bad apples.”⁴⁴ In his response to the breaking news of prisoner abuse and torture at Abu Ghraib, President Bush both condemned the behavior, and was quick to assert that Abu Ghraib was aberrational. We stand, after all, for freedom. Similarly, in the immediate aftermath of the revelations of the My Lai massacre, in the face of the vivid photographs of dead civilians, there was widespread denial that the massacre occurred, or that we could have possibly been involved. The authors of a study on the American response to the news of My Lai captured this reaction in their title: *It Didn't Happen and Besides, They Deserved It*.⁴⁵ Today My Lai is forgotten by many and has never been heard of by many too young to have forgotten it. And once again we think ourselves innocent.

⁴² See generally DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (1960); FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992); SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* (1960).

⁴³ Steve Schifferes, *US Names “Coalition of the Willing”*, BBC NEWS ONLINE, Mar., 18, 2003, available at <http://news.bbc.co.uk/2/hi/americas/2862343.stm>.

⁴⁴ See DANNER, *supra* note 11, at 27 (describing the “‘few bad apples’ argument, long the classic defense of states accused of torture” as the Bush Administration’s “master narrative” of Abu Ghraib); Johanna McGeary, *Pointing Fingers*, TIME, May 24, 2004, at 44.

⁴⁵ Edward M. Opton, Jr. & Robert Duckles, *It Didn't Happen and Besides, They Deserved It*, in *CRIMES OF WAR* 441 (Richard A. Falk et al. eds., 1971).

III. HIDING TORTURE AND PROCLAIMING INNOCENCE

*"The United States of America does not torture."*⁴⁶

Today, we have more restrained sensibilities than our forbears did during the suppression of the Philippines insurrection. The world's collective distaste for such atrocious techniques is reflected in the Geneva Conventions, and the conventions on human rights and torture.⁴⁷ America's public enthusiasm for torture is largely limited to such fantasies as the television drama *24* and the musings of some law professors on ticking time bomb scenarios.⁴⁸ Nevertheless, torture and abuse continue to be a part of our world, and in the "Global War on Terror" America commits, condones, and acquiesces in such acts. The two sections that follow examine the ways in which we try to distance ourselves from torture even as we are responsible for it.

A. What Happens in Bagram, Stays in Bagram

*We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.*⁴⁹

While we may never know the extent of authorized torture that we have employed in the wars against Al Qaeda and Iraq, we have seen suffi-

⁴⁶ Press Release, White House, President Tours Border, Discusses Immigration Reform in Texas (Nov. 29, 2005).

⁴⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. H/810 (Dec. 12, 1948); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁴⁸ See, e.g., ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT AND RESPONDING TO THE CHALLENGE 131-63 (2002) (advocating regulated use of torture pursuant to a court ordered torture warrant in so-called ticking bomb scenarios).

⁴⁹ *Meet the Press* (NBC television broadcast Sept. 16, 2001) (featuring Vice President Richard Cheney).

cient glimpses to know that torture done by Americans in the name of America is not simply the excesses of “a few bad apples.”⁵⁰ Because it takes us far afield from extraordinary rendition, I will only touch briefly on some of the ways that the United States has attempted to distance itself from its own acts of torture and abuse.⁵¹ In recent years these efforts have included redefinitions or crabbed definitions of the word torture,⁵² delegation to off-the-books agents, whether private contractors or the CIA,⁵³ and relegating our prisoners to jurisdictional netherworlds as ghost detainees, or as “enemy combatants,” or to places, such as Guantanamo, where we assert that the U.S. Constitution and the courts do not reach.⁵⁴ Recent revelations that the CIA maintained secret prisons in Eastern Europe not only suggested that the so-called “new Europe”⁵⁵ may not have abandoned the facilities or techniques of its Warsaw Pact past, but gives a small glimpse of what is widely assumed to be a network of secret prisons.⁵⁶ There, in the shadows, beyond the reach of international humanitarian organizations such as the Red Cross, and beyond the notice and attention of Americans, America’s captives in the War Against Terror are left to the mercy of apparently unaccountable American civilian or military forces. Disappeared to nowhere, some of our prisoners simply cease to exist, and one cannot torture a ghost. While some

⁵⁰ See DANNER, *supra* note 11, at 27.

⁵¹ For a discussion of a variety of techniques employed by states to hide or deny their responsibility for “state crime,” that similarly sees this distancing as at least partly a process of “othering,” see Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, 45 BRIT. J. CRIMINOLOGY 504 (2005).

⁵² See, e.g., Bybee Memorandum, *supra* note 11. The Bush administration ultimately renounced the definitional limits of the Bybee Memorandum, but has continued to evade acknowledging that techniques such as waterboarding or the use of stress positions constitute torture.

⁵³ On the CIA and torture, see generally JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* 20-37 (2006).

⁵⁴ The United States Supreme Court rejected at least the strong version of this claim in *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that detainees at Guantanamo Naval Base in Cuba are not beyond the reach of habeas corpus relief). The White House position appears to be that the U.S. Constitution similarly only has limited reach into the Oval Office. For a discussion of torture at Guantanamo, see SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 1-14 (2004); Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 60. For a discussion of both Guantanamo and Abu Ghraib, and the relationship between the two, see DANNER, *supra* note 11, at 26-48.

⁵⁵ In January 2003, Secretary of Defense Donald Rumsfeld criticized France and Germany for their opposition to U.S. policy. He dismissed them as belonging to “old Europe” in contrast to former Warsaw Pact countries that supported U.S. policy. Donald Rumsfeld, Sec’y of Def., U.S. Dep’t of Def., Briefing at the Foreign Press Center (Jan. 22, 2003), available at http://www.defenselink.mil/transcripts/2003/t01232003_t0122sdfpc.html.

⁵⁶ RISEN, *supra* note 53, at 29-37; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

of these maneuvers have come to light,⁵⁷ in an administration that is obsessed with secrecy, there is no way of knowing the extent to which we have hidden instances of torture and abuse.

In addition to these well-publicized efforts to distance ourselves from our own acts of torture and abuse, one other recent revelation, which has not gained the same level of press attention merits mention, in part because of its echoes of similar practices during the Vietnam War. This is the practice of instructing American military personnel in the techniques of torture with a nod and a wink in the guise of teaching resistance to interrogation.

In his 1967 critique of American militarism and of the Green Beret, *The New Legions*, former Green Beret Sergeant Donald Duncan describes the training that he both received and later gave in torture techniques.⁵⁸ Duncan acknowledges that Special Forces doctrine favored psychological methods over physical methods for interrogations.⁵⁹ Nevertheless, he argues, Green Beret training also signaled that in some instances resort to physical methods was appropriate.⁶⁰ In his book, he recounts the following exchange between an instructor and a trainee:

“Sergeant Lacey, the name of this class is ‘Counter-measures to Hostile Interrogation,’ but you have spent most of the period telling us there are no counter-measures. If this is true, then the only reason for teaching them, it seems to me, is so that we’ll know how to use them. Are you suggesting we use these methods?”

The class laughs, and Lacey looks down at the floor, creating a dramatic pause. When he raises his head, his face is solemn but his deep-set eyes are dancing. “We can’t tell you that, Sergeant Harrison. The Mothers of America wouldn’t approve.” The class bursts into laughter at the sarcastic cynicism. “Furthermore,” a conspiratorial wink, “we will deny that any such thing is taught or intended.”⁶¹

⁵⁷ Priest, *supra* note 56.

⁵⁸ DONALD DUNCAN, *THE NEW LEGIONS* 156-61 (1967).

⁵⁹ *Id.* at 156-57.

⁶⁰ *Id.* at 156-61.

⁶¹ *Id.* at 159. This practice of teaching torture techniques under the cover of teaching resistance to torture or techniques “to avoid” appears to be widespread. For example, during the 1960s and 1970s, students at the American-run International Police Academy wrote essays on torture that in some instances embraced its use. They also were shown a film on improper interrogation techniques. MICHAEL MCCLINTOCK, *INSTRUMENTS OF STATECRAFT: U.S. GUERRILLA WARFARE, COUNTER-INSURGENCY, AND COUNTER-TERRORISM, 1940-1990* 193-96 (1992). For a discussion of a similar practice among British special forces troops in Northern Ireland, where in addition to the official rules, special forces followed the unwritten “‘big boys’ rules,” see Jamieson & McEvoy, *supra* note 51, at 508-09.

U.S. Army interrogators who served in Vietnam tell a similar account of what James Gibson has described as a "dual structure" in their curriculum.⁶² Their "legal education" taught from the official manuals was coupled with "an illegal education taught orally by instructors."⁶³

Recent revelations about interrogation practices at Guantanamo Naval Base indicate that detainees are similarly suffering abuse that is a product of training originally designed to help American servicemen and servicewomen resist interrogation and torture. Journalist Jane Mayer writes that psychologists associated with the "Survival, Evasion, Resistance, and Escape" (SERE) training program taught at Fort Bragg, North Carolina, have tried to "reverse-engineer" the SERE program, in order to devise methods to help place Guantanamo detainees under sufficient stress to break them.⁶⁴ Mayer notes that many of the coercive techniques employed at Guantanamo are similar to those used in SERE training.⁶⁵ While SERE training clearly is intended for its stated purpose, unlike the training described by Duncan during his Green Beret days, under the cover of the SERE program, its teachings have taken on a more pernicious use.⁶⁶

B. Othering Torture

*"[After declining to eliminate a group of prisoners, we were later told by base camp that] you wouldn't have to do it; all you had to do was give them over to the Vietnamese."*⁶⁷

"Khong, danh cho co"

*"If they are not guilty, beat them until they are."*⁶⁸

1. The Division of Terror in Vietnam

The Vietnamese were not the only perpetrators of torture during the Vietnam War. While official American military policy did not encourage torture, American interrogators sometimes used physical coercion and engaged in other abusive tactics, without sanction or disapproval.⁶⁹ While some returning veterans may have exaggerated or fabricated their stories of torture, abusive conduct, and murder of prisoners, there are too many ac-

⁶² JAMES W. GIBSON, *THE PERFECT WAR: TECHNOWAR IN VIETNAM* 183 (1986).

⁶³ *Id.* at 183-85.

⁶⁴ Mayer, *supra* note 54, at 63-64.

⁶⁵ *Id.* at 64.

⁶⁶ *See id.* at 67.

⁶⁷ Donald Duncan, "*The Whole Thing Was a Lie!*", 4 RAMPARTS 12, 21 (1966).

⁶⁸ Saigon police slogan, *quoted in* AMNESTY INTERNATIONAL, *POLITICAL PRISONERS IN SOUTH VIETNAM* 27 (1973) [hereinafter AMNESTY INTERNATIONAL].

⁶⁹ GIBSON, *supra* note 62, at 182-87. The enemy also used torture and terror techniques.

counts of such behavior to deny that sometimes American soldiers and marines tortured their Vietnamese prisoners. Veterans who testified at the Winter Soldier Investigation, organized by Vietnam Veterans against the War, and at the Congressional hearings on war crimes, organized by Congressman Ron Dellums, gave ample examples of a wide array of torture practices and techniques including, beatings, threatened rapes, water torture, electric shocks to the genitals and other parts of the body, and locking prisoners in a room to spend the night with a python.⁷⁰

Typically, however, it was not American servicemen who tortured or killed prisoners.⁷¹ That task was left for the Vietnamese.⁷² The widespread practice was for Americans to turn over prisoners to the ARVN or to the National Police, knowing that the prisoners were almost certain to be tortured and possibly killed.⁷³ Objecting to this practice, Peter Hamill wrote:

The fact is that American soldiers—who are now doing almost all of the fighting—are violating the Geneva Convention relative to the Treatment of Prisoners of War every day. It is a violation for soldiers of one army to turn over prisoners of war to soldiers of another army. And that is precisely what we do.

Every correspondent in Vietnam knows this, and has seen it for himself. An American unit will move into a village, or an area, and round up every male. A South Vietnamese liaison officer will then interrogate each man, and if he believes the man is a Viet Cong guerilla, or even a sympathizer, the man will be taken off to a detainment camp. After detailed interrogation, he is usually executed.⁷⁴

⁷⁰ THE DELLUMS COMMITTEE HEARINGS ON WAR CRIMES IN VIETNAM: AN INQUIRY INTO COMMAND RESPONSIBILITY IN SOUTHEAST ASIA 83-156 (Citizens' Comm'n of Inquiry eds., 1972) [hereinafter DELLUMS COMMITTEE HEARINGS]; see also VIETNAM VETERANS AGAINST THE WAR, THE WINTER SOLDIER INVESTIGATION: AN INQUIRY INTO AMERICAN WAR CRIMES 101-21 (1972) [hereinafter VIETNAM VETERANS AGAINST THE WAR]. At the time, the Nixon administration charged that many of the testifying witnesses were never in Vietnam. Unfortunately, that allegation has had considerable persistence. In fact, the Vietnam Veterans Against the War carefully vetted their witnesses and established that they were in Vietnam when they said they were. For a discussion of these hearings, see ANDREW E. HUNT, *THE TURNING: A HISTORY OF VIETNAM VETERANS AGAINST THE WAR* 55-76 (1999); GERALD NICOSIA, *HOME TO WAR: A HISTORY OF THE VIETNAM VETERANS' MOVEMENT* 73-93 (2001).

⁷¹ *IN THE NAME OF AMERICA* 66 (Seymour Melman ed., 1968).

⁷² See Strassfeld, *supra* note 18, at 914.

⁷³ *Id.*; *IN THE NAME OF AMERICA*, *supra* note 71, at 66-69. The process of transferring prisoners and their subsequent treatment is described in Orville Schell, *Cage for the Innocents*, in *WHO WE ARE* 130-44 (Robert Manning & Michael Janeway eds., 1969).

⁷⁴ Peter Hamill, *N.Y. POST*, July 22, 1966, *quoted in* *IN THE NAME OF AMERICA*, *supra* note 71, at 66-67.

The practice of transferring prisoners of war to another country's control without determining that the receiving country will abide by the Geneva Convention's provisions regarding the treatment of prisoners of war violates that Convention.⁷⁵ Nevertheless, the practice of transfer, and the consequences for the prisoners was well known both to the American military and to those who cared to notice in the United States. Certainly by 1965, if not earlier, the U.S. press had frequently described the torture practices of ARVN interrogators.⁷⁶ The following year, Ohio Senator Stephen Young protested the practice on the Senate floor.⁷⁷ Nevertheless, Americans continued to transfer prisoners to their Vietnamese counterparts and to observe the torture of those prisoners throughout the war.⁷⁸

American servicemen tended to argue that they could not protest without risking retaliation or harm to their military careers.⁷⁹ In fact, little evidence exists of any such retaliation.⁸⁰ Americans also argued that protest would be futile and would only have the effect of alienating their Vietnamese ally.⁸¹ In response to this argument, journalist Malcolm Browne wrote:

I must observe here that if the United States ever had had a really serious objection to the torture of Viet Cong prisoners, the practice could have been swiftly halted. On the one hand, the United States dominates Viet Nam's armed forces, and on the other, it contends it has no control over such matters as the torture of prisoners.⁸²

In fact, American military doctrine relied on the South Vietnamese to engage in torture, abuse, and murder. It was more than just a convenience

⁷⁵ Geneva III, *supra* note 47, art. 12.

⁷⁶ See, e.g., MALCOLM W. BROWNE, *THE NEW FACE OF WAR*, 195-202 (rev. ed. 1968); Lloyd Garrison, *U.S. Tries to Curb Vietnam Torture*, N.Y. TIMES, July 28, 1965, at 2.; Neil Sheehan, *Vietnam: The Unofficial Brutality*, N.Y. TIMES, Sept. 30, 1965, at 4; *IN THE NAME OF AMERICA*, *supra* note 71, at 58-90, 110-16 (collecting newspaper articles and other sources). Indeed, in a New York Times article from November 1963, which focused primarily on the torture of political prisoners under the Diem regime, the author said of the use of electric shocks in torture, that "[m]any United States military advisers and foreign newsmen have seen variations of this torture applied to Vietcong suspects in the field." *Political Prisoners in Vietnam Tell of Torture*, N.Y. TIMES, Nov. 9, 1963, at 4.

⁷⁷ *IN THE NAME OF AMERICA*, *supra* note 71, at 66.

⁷⁸ See, e.g., DELLUMS COMMITTEE HEARINGS, *supra* note 70, at 85-90 (testimony of SP/5 Nathan Hale) (describing hanging and beating of prisoners in the presence of Americans); DUNCAN, *supra* note 58, at 180-82 (describing incident where frustrated Vietnamese interrogator cut the gall bladder out of a prisoner as U.S. Special Forces looked on); VIETNAM VETERANS AGAINST THE WAR, *supra* note 70, at 101-05 (testimony of SP/4 Steve Noetzel) (describing ARVN guards throwing prisoners out of helicopters in flight).

⁷⁹ See Strassfeld, *supra* note 18, at 914.

⁸⁰ *Id.*

⁸¹ See *id.*

⁸² BROWNE, *supra* note 76, at 198.

for the Vietnamese to do much of the dirty work of harsh interrogation. Nor was it simply a matter of taking advantage of the knowledge of language and culture that the Vietnamese had. Donald Duncan recalls that his instructors in countermeasures to interrogation taught:

When you are in a foreign country as part of a guerrilla organization, you will not be doing the interrogating. Your job is to teach the various methods of interrogation to your indigenous counterpart. It would be very bad form for you, as an outsider, to do the questioning—especially if it gets nasty. The forces opposing your guerillas will probably be a native, be the same color, have the same religion. If you display a willingness to harm the natives, even though they are the enemy, it could be misunderstood by your guerrillas as prejudice. The indigenous guerrilla leader must believe that the idea for a course of action comes from himself; your control must be by suggestion.⁸³

What is at work here is what I have elsewhere described as a “division of terror.”⁸⁴ American forces largely limited themselves to “‘legal’ terrors [such] as free fire zones, napalm, white phosphorous, defoliation, fragmentation bombs,” relocations of populations to strategic hamlets, and dropping more tonnage of bombs than we had in World War II.⁸⁵ We mostly left to our Vietnamese counterparts unseemly terrors, such as kidnapping and assassination, and “torture and murder of prisoners.”⁸⁶ In so doing, we were not “helpless onlookers,” but beneficiaries of their actions.⁸⁷ The Vietnamese were not oblivious to the hypocrisy involved. One Vietnamese officer said to Malcolm Browne:

“You don’t like the methods we apply to prisoners and the way we do business in the field But you have nothing against the use of artillery barrages, and air strikes using heavy bombs and napalm. Have you ever visited a hamlet hit by napalm after your planes have finished?”⁸⁸

Torture carried out on the field, or back at the base in the immediate aftermath of a battle or a sweep through a village where often peasants were indiscriminately rounded up for interrogation, was only a small part of the routine of torture practiced by the Vietnamese. Torture was also widely used by the National Police against those deemed to be political threats to the various Vietnamese regimes that governed during our involvement there

⁸³ DUNCAN, *supra* note 58, at 159.

⁸⁴ Strassfeld, *supra* note 18, at 919.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ BROWNE, *supra* note 76, at 200.

and to determine whether arrestees posed a threat to the government.⁸⁹ While typically the government classified these prisoners as suspected communists, one could land in a South Vietnamese prison for any number of reasons ranging from being a Buddhist, especially during the Diem regime, to "neutralism," to participating in a student demonstration or a peace demonstration, to offending a neighbor or Village Chief who then sought revenge by identifying you as part of the National Liberation Front infrastructure under the Phoenix Program.⁹⁰

A 1973 Amnesty International report noted that the "United States [was] intimately involved in the funding and training of the [National] police" and, therefore, deeply implicated in the imprisonment and torture of political prisoners throughout our involvement in Vietnam.⁹¹ The training and expansion of the National Police was largely a project of the Office for Public Safety of the Agency for International Development.⁹² At least in some instances, that training appears to have included instruction in physically coercive interrogation techniques.⁹³ One Vietnamese graduate of the American-run International Police Academy, in an essay on coercive interrogation techniques entitled *Three Ways of Interrogation*, thanked "the United States for having 'assisted the national police in technical and equipments aid to help an interrogator in his interrogation of communist prisoners to be more effective.'"⁹⁴

The leaders of the coup that overthrew the Diem regime in November 1963 released thousands of political prisoners.⁹⁵ Quickly, however, and especially after a 1965 coup toppled the Khanh government and brought General Nguyen Cao Ky to power, the South Vietnamese government began to refill its jails. Though accurate numbers were hard to establish, "neutralists, peace leaders, and former prisoners themselves" estimated the number as at least 200,000 in 1970.⁹⁶ Three years later, Amnesty International concluded that despite the April 1973 peace treaty, which required prisoner

⁸⁹ HOLMES BROWN & DON LUCE, *HOSTAGES OF WAR: SAIGON'S POLITICAL PRISONERS* 7-10 (1973); ALFRED HASSLER, *SAIGON, U.S.A.* 80-97 (1970); see also MARILYN B. YOUNG, *THE VIETNAM WARS: 1945-1990* 145 (1991).

⁹⁰ HASSLER, *supra* note 89, at 91-92, 96.

⁹¹ AMNESTY INTERNATIONAL, *supra* note 68, at 13.

⁹² The United States bankrolled the police force's expansion from 19,000 men in 1962 under the Diem government, to 114,000 in 1972, with plans for further expansion, and had trained the additional men. *Id.* In addition to the National Police force, various other police forces and intelligence services operated in South Vietnam.

⁹³ See MCCLINTOCK, *supra* note 61, at 194-95.

⁹⁴ *Id.* at 195 (citing Nguyen Van Thieu, *Three Ways of Interrogation*, Aug. 10, 1965).

⁹⁵ *Political Prisoners in Vietnam Tell of Torture*, *supra* note 76, at 4.

⁹⁶ HASSLER, *supra* note 89, at 96-7.

release, the Saigon government was still holding at least 70,000-75,000 political prisoners and that the number might exceed 100,000 prisoners.⁹⁷

The National Police Headquarters was one of the most feared locations in South Vietnam, and the Saigon government established provincial interrogation centers in each of its provinces.⁹⁸ United States military and civilian personnel were deeply implicated in the prison system, with American advisers assigned throughout the system.

The symbol of state repression in South Vietnam became the Tiger Cages at the prison on Con Son Island.⁹⁹ Originally built by the French,¹⁰⁰ the Saigon government readily adopted this symbol of French colonial rule. The Tiger Cages were tiny overcrowded cells in a hidden part of the Con Son prison that were open on the top to the elements and to the abuses of prison guards.¹⁰¹ Prisoners, some sent there for refusing to salute the Vietnamese or American flags, were malnourished, brutalized, and forced to remain in cramped positions.¹⁰² Many were permanently crippled by their confinement in such small space, left unable to walk or to stand erect.¹⁰³

Americans learned of the Tiger Cages through the efforts of Don Luce, an American who was working in Vietnam with the International Voluntary Services and the World Council of Churches, and a Vietnamese college student who had recently been released from Con Son prison.¹⁰⁴ Together with Tom Harkin, then a congressional aide, they persuaded Congressmen Augustus Hawkins and William Anderson to charter a plane and investigate Con Son.¹⁰⁵ Armed with a map drawn by the released prisoner, they went intent on finding the Tiger Cages.¹⁰⁶ Before they got to Con Son, Frank Walton, Director of the U.S. Public Safety program in Vietnam assured them the prison was not really like a prison.¹⁰⁷ Rather, it "is more like a Boy Scout Recreational Camp."¹⁰⁸ Despite Walton's and the prison commander's efforts to keep them from discovering the Tiger Cages, they managed to find the door that the Vietnamese student had told them about and to

⁹⁷ AMNESTY INTERNATIONAL, *supra* note 68, at 7-8.

⁹⁸ See HASSLER, *supra* note 89, at 80; YOUNG, *supra* note 89, at 145.

⁹⁹ See BROWN & LUCE, *supra* note 89.

¹⁰⁰ *Id.* at 36.

¹⁰¹ *Id.* at 39-41.

¹⁰² *Id.* at 36.

¹⁰³ *Id.*

¹⁰⁴ *Id.*; *The Tiger Cages of Con Son*, LIFE, July 17, 1970, at 26[hereinafter *Tiger Cages*]. See also Ralph Graves, *Editor's Note: How They Uncovered the Tiger Cages*, LIFE, July 17, 1970, at 2A.

¹⁰⁵ Graves, *supra* note 104, at 2A.

¹⁰⁶ *Id.*; *Tiger Cages*, *supra* note 104, at 26.

¹⁰⁷ BROWN & LUCE, *supra* note 89, at 36.

¹⁰⁸ *Tiger Cages*, *supra* note 104, at 29.

cause a commotion that ultimately resulted in their getting to the Tiger Cages.¹⁰⁹ There they found prisoners starving and thirsty who complained bitterly of their treatment.¹¹⁰ Walton's response was to berate the visitors for "poking your nose into doors that aren't your business."¹¹¹ On the return flight, another member of the Congressional delegation tried to seize the camera with which Harkin had photographed the Tiger Cages.¹¹²

The Saigon government promised to get rid of the Tiger Cages.¹¹³ However, the following year the United States Department of the Navy contracted with a construction consortium, "Raymond, Morrison, Knudson-Brown, Root and Jones to build 384 new 'isolation cells' to replace the Tiger Cages."¹¹⁴ These new cells were two square feet smaller,¹¹⁵ and far less well ventilated than the Tiger Cages they replaced.¹¹⁶ The funding for the cells came from the U.S. Food for Peace Program, and the construction labor was provided by prisoners being paid fifty-five to seventy-two cents per week.¹¹⁷ The Brown and Root components of this construction consortium are the Brown and Root of the Haliburton subsidiary, KBR.¹¹⁸ Most recently, they capitalized on their expertise to build the cells at Guantanamo Naval Base.¹¹⁹

2. A Different "Vietnam Syndrome"

Americans have noted what has been described as a "Vietnam Syndrome" resulting from our unhappy experience in America's longest, and least successful, war.¹²⁰ In the aftermath of Vietnam, Americans have shown great reluctance to support military ventures involving the commitment of American troops unless the war promised to be short with minimal American casualties. Americans have also shown greater willingness to question the motives and judgment of their government whenever it has

¹⁰⁹ BROWN & LUCE, *supra* note 89, at 38; Graves, *supra* note 104, at 2A.

¹¹⁰ *Tiger Cages*, *supra* note 104, at 26-29.

¹¹¹ *Id.* at 29.

¹¹² Graves, *supra* note 104, at 2A.

¹¹³ BROWN & LUCE, *supra* note 89, at 43; *Saigon is Investigating 'Tiger Cage' Cells at a Prison*, N.Y. TIMES, July 11, 1970, at 9; *500 from Con Son Flown to Saigon*, N.Y. TIMES, July 15, 1970, at 1.

¹¹⁴ *Id.* at 43.

¹¹⁵ *Id.*

¹¹⁶ AMNESTY INTERNATIONAL, *supra* note 68, at 21.

¹¹⁷ Don Luce, *We've Been Here Before: The Tiger Cages of Vietnam*, HIST. NEWS NETWORK, Apr. 4, 2005, <http://hnn.us/articles/11001.html>; George Wald, *The Other Prisoners*, N.Y. TIMES, Jan. 10, 1972, at 33.

¹¹⁸ Luce, *supra* note 117.

¹¹⁹ *Id.*

¹²⁰ HERRING, *supra* note 15, at 307-12; YOUNG, *supra* note 89, at 314-16.

engaged in saber rattling. This healthy reluctance to commit American troops to battle has at times impeded the ability of the United States government to act unfettered in the world.

There is, however, a second Vietnam Syndrome that goes much less noticed. Even as the war was being fought, members of the foreign policy and defense establishment were second-guessing our approach to the war.¹²¹ Ever since, revisionist accounts have adhered to the fantasy that the war was winnable if only we had fought it differently.¹²² Some of these revisionist accounts essentially simply repeat the often expressed Vietnam-era complaint that our military was “forced to fight with one hand tied behind its back.”¹²³ Others, however, suggest that a combination of a more muscular civic action program and the CIA’s Phoenix Program, which was intended to “neutralize” the “Viet Cong infrastructure,” and which resulted in the killing of at least 20,000 supposed members of that infrastructure and the kidnapping or arrest and torture and imprisonment of perhaps double that number, would have resulted in victory.¹²⁴

As Michael Klare and Cynthia Arnson have shown, even during the Vietnam War, voices for greater reliance on aggressive and early police action against “subversives” suggested that the United States could further its policy goals by assisting indigenous proxy forces, rather than by the heavy handed, and sometimes self-defeating commitment of major military

¹²¹ See *infra* text accompanying notes 125-131.

¹²² The revisionist literature that contends that the war was a winnable noble cause continues to grow. Important examples include, GUENTER LEWY, *AMERICA IN VIETNAM* (1978); U.S. GRANT SHARP, *STRATEGY FOR DEFEAT* (1978); LEWIS SORLEY, *A BETTER WAR: THE UNEXAMINED VICTORIES AND FINAL TRAGEDY OF AMERICA’S LAST YEARS IN VIETNAM* (1999); HARRY G. SUMMERS, JR., *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* (1982); WILLIAM C. WESTMORELAND, *A SOLDIER REPORTS* (1976).

¹²³ For an example of this mantra, see OLIVER L. NORTH & DAVID ROTH, *ONE MORE MISSION: OLIVER NORTH RETURNS TO VIETNAM passim* (1993). This idea is also expressed in the film *RAMBO: FIRST BLOOD PART II* (TriStar Pictures 1985). There troubled super survivor Vietnam veteran John Rambo (Sylvester Stallone) is sent on a mission to postwar Vietnam to investigate rumors of captive American POWs still being held by the Vietnamese. Upon accepting the mission, Rambo asks, “Do we get to win this time.” For a discussion of the film, see John Hellman, *Rambo’s Vietnam and Kennedy’s New Frontier*, in *INVENTING VIETNAM: THE WAR IN FILM AND TELEVISION* 140-52 (Michael Andregg ed., 1991); Gregory A. Waller, *Rambo: Getting to Win This Time*, in *FROM HANOI TO HOLLYWOOD: THE VIETNAM WAR IN AMERICAN FILM* 113-128 (Linda Dittmar & Gene Michaud eds., 1990). For a critical comment on the “one hand tied behind their backs” explanation of the war’s outcome, see Bob Buzzanco, *25 Years After End of Vietnam War: Myths Keep Us from Coming to Terms with Vietnam*, *BALTIMORE SUN*, Apr. 17, 2000, available at www.commondreams.org/views/041700-106.htm.

¹²⁴ On Phoenix, see JOHN PRADOS, *LOST CRUSADER: THE SECRET WARS OF CIA DIRECTOR WILLIAM COLBY* 207-38 (2003); YOUNG, *supra* note 89, at 212-13; see generally JEFF STEIN, *A MURDER IN WARTIME: THE UNTOLD SPY STORY THAT CHANGED THE COURSE OF THE VIETNAM WAR* (1992).

force.¹²⁵ Speaking to the International Police Academy in late 1965, General Maxwell Taylor stated:

The outstanding lesson [of Vietnam] . . . is that we should never let another Vietnam-type situation arise again. We were too late in recognizing the extent of the subversive threat. We appreciate now that every young, emerging country must be constantly on the alert, watching for those symptoms which, if allowed to develop unrestrained, may eventually grow into a disastrous situation such as that in South Vietnam. . . . We have learned the need for a strong police force and a strong police intelligence organization to assist in identifying early the symptoms of an incipient subversive situation.¹²⁶

Elaborating on this idea, Undersecretary of State U. Alexis Johnson, articulated a notion of policing of dissidents as "preventive medicine."¹²⁷ By suppressing dissident organizations before they could gain significant popular support, the United States could avoid future Vietnams.¹²⁸

In accordance with this approach, in the 1960s and 1970s AID's Office of Public Safety worked closely with the police and paramilitary forces of some of the most repressive regimes in the world, including Iran, Chile, Brazil, Guatemala, El Salvador, and Indonesia.¹²⁹ Even before the creation of the Office of Public Safety, U.S. programs provided police training to a wide array of police forces.¹³⁰ Between 1954 and 1975, the United States trained over 7,500 foreign police officers in the U.S. and over a million police officers abroad.¹³¹ Obviously, many of these trainees came from non-repressive states, but the American footprint resulting from these training programs has also been large in authoritarian regimes. While Congress put an end to the Office of Public Safety program in 1975, the United States has given training and support to the agents of repressive regimes in a variety of other ways.¹³²

¹²⁵ See generally MICHAEL T. KLARE & CYNTHIA ARNSON, *SUPPLYING REPRESSION: U.S. SUPPORT FOR AUTHORITARIAN REGIMES ABROAD* (1981).

¹²⁶ *Id.* at 19.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 19-27; Cynthia Arnson, *Window on the Past: A Declassified History of Death Squads in El Salvador*, in *DEATH SQUADS IN GLOBAL PERSPECTIVE: MURDER WITH DENIABILITY* 85, 92-93 (Bruce B. Campbell & Arthur D. Brenner eds., 2000) (describing the Office of Public Safety's assistance to the El Salvador regime during the 1960s).

¹³⁰ EDWARD S. HERMAN, *THE REAL TERROR NETWORK: TERRORISM IN FACT AND PROPAGANDA* 127 (1982).

¹³¹ *Id.*

¹³² MCCLINTOCK, *supra* note 61.

In this era of globalization, torture is a global phenomenon.¹³³ The United States has indirectly supported torture by training and supplying the militaries of countries that engage in torture and other repressive techniques, and by bolstering those countries with economic support.¹³⁴ The United States has also permitted private manufacturers to sell the implements of torture and abuse to an array of repressive regimes. A 2003 Amnesty International Report, *The Pain Merchants* found that U.S. manufacturers exported \$14.7 million worth of electroshock devices and \$4.4 million worth of shackles and other restraints.¹³⁵

A particularly troubling example of American involvement in the globalization of torture has been the operation of the School of the Americas, now renamed the Western Hemisphere Institute for Security Cooperation, which is dedicated to training Latin American soldiers.¹³⁶ Founded in 1946, though not dubbed the School of the Americas until 1963, the school represented part of America's reaction to the Cold War and perceived threats to stability in Latin America.¹³⁷ While many of the school's alumni have unblemished human rights records, many other graduates have participated in human rights abuses.¹³⁸ Indeed, one commentator states that the school's graduates "have played key roles in nearly every coup and major human rights violation in Latin America in the past fifty years."¹³⁹

In the 1990s, the school's use of a number of manuals that counseled the use of assassination, false arrest, intimidation of families of dissidents, and torture came to light.¹⁴⁰ Pentagon officials attributed the manuals to overzealous junior officers who "simply assumed that U.S. laws against assassination, beatings, and blackmail applied only to U.S. citizens and thus were not applicable to the training of foreign military officers."¹⁴¹ In addition to manuals prepared by the military, the school used two manuals pre-

¹³³ See Jeffrey A. Sluka, *Introduction: State Terror and Anthropology*, in *DEATH SQUAD: THE ANTHROPOLOGY OF STATE TERROR 3* (Jeffrey A. Sluka ed., 2000) ("[I]n 1996 over half of the world's governments were guilty of using torture on a systematic, institutionalized basis—that is, as a 'normal' mode of governance.").

¹³⁴ *Id.* at 119-32. See generally KLARE & ARNSON, *supra* note 125.

¹³⁵ See AMNESTY INT'L, *THE PAIN MERCHANTS* (2003), [http://web.amnesty.org/library/pdf/ACT400082003ENGLISH/\\$File/ACT4000803.pdf](http://web.amnesty.org/library/pdf/ACT400082003ENGLISH/$File/ACT4000803.pdf).

¹³⁶ Timothy J. Kepner, *Torture 101: The Case Against the United States for Atrocities Committed by School of the Americas Alumni*, 19 DICK. J. INT'L L. 475, 476 (2001).

¹³⁷ *Id.* at 478.

¹³⁸ See *id.* at 476, 480-81.

¹³⁹ *Id.* at 476.

¹⁴⁰ *Id.* at 486-87.

¹⁴¹ *Id.* at 488 (citing School of the Americas Watch, Pentagon Investigation Concludes that Techniques in SOA Manuals were "Mistakes", <http://www.soaw.org/new/article.php?id=269>).

pared by the C.I.A.¹⁴² Both of these manuals included a chapter on coercive interrogation techniques.¹⁴³

3. The Harms of Othering Torture

Recognizing the harms of torture, what are the additional harms of othering torture? Judge Richard Posner, who argues that sometimes torture is necessary and appropriate, suggests that a country might do best by distancing itself from its acts of torture in order to lessen the likelihood of degrading spillover effects on its culture.¹⁴⁴ Perhaps, he suggests, it is best left to "military personnel in a foreign country."¹⁴⁵ Without accepting his underlying premise that it would be irresponsible for a government not to torture under certain circumstances, one can pursue his logic an additional step. I assume that he contemplates a country relying on its own military to torture in a far-away place, but if distancing serves as a useful insulation, why not delegate, or outsource, if you will, the torture to someone else?

One wrong of othering torture is that it shelters our culture only at the cost of impairing someone else's. When we other torture, by a division of terror, or by extraordinary rendition, we corrupt another society. When our hiring acts out of greed or economic want, our purchase of clean hands is a crass transaction. When, as in Vietnam, we delegate to those who we are ostensibly there to help, our conduct is particularly cynical. We undermine the very same society that we profess to be assisting, and we corrupt democratic values and the rule of law while we assert that we are acting for the noble purpose of bolstering them.

The harmfulness of othering torture goes beyond the degrading effect that it has on the people that we ask to do our dirty work. Torture by its very nature others the victim. It reduces the victim to an object that is wholly dependent on the whim of the torturer. It robs the victim of her dignity and of her ability to act on her own behalf, turning her will into a weapon against herself as she comes to be willing to do anything, including condemning herself and others to make the torture stop. It degrades the victim to the point where the victim is wholly other. She may physically appear human, but those things at the core of her humanity are no longer within her control.¹⁴⁶ When torture occurs in the setting of savage war, waged against

¹⁴² Lisa Haugaard, *Declassified Army and CIA Manuals used in Latin American: An Analysis of Their Content*, LATIN AMERICAN WORKING GROUP, Feb. 18, 1997, <http://www.lawg.org/misc/Publications-manuals.htm>.

¹⁴³ *Id.* Excerpts from the manuals can be found at Latin American Working Group.

¹⁴⁴ Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION* 291 (Sanford Levinson ed., 2004).

¹⁴⁵ *Id.* at 294-95.

¹⁴⁶ The best starting point for an understanding of torture's effects on its victims is ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 27-59 (1985).

people who are racially or ethnically different, it reinforces the beliefs, already inculcated in the troops to ready them to fight, that the enemy is an alien other.

By relying on Vietnamese to torture and abuse other Vietnamese, we bolstered this sense of the Vietnamese as an alien barbaric other. Watching ARVN interrogators or National Police torture and murder helpless prisoners, many of them hapless civilians, could only reinforce American notions of the savagery of the Vietnamese. This, in turn, strengthened our justification for our own savagery, for our side of the division of terror. It reinforced the beliefs that “they” only understood force and that brutality and torture were a part of “their” culture and therefore merely something that we had to reluctantly, but necessarily, embrace. During the operation that led to the destruction of the village of Ben Suc, ARVN interrogators tortured villagers as Americans looked on.¹⁴⁷ Explaining it all, an American officer said to journalist Jonathan Schell:

“You see, they *do* have some—well, methods and practices that *we* are not accustomed to . . . but the thing you’ve got to understand is that this is an Asian country, and their first impulse is force . . . It’s the Asian mind. It’s completely different from what we know as the Western mind”¹⁴⁸

Similarly, during that part of army dissenter Dr. Howard Levy’s court-martial, where he was permitted to raise a Nuremberg defense that U.S. Special Forces were committing war crimes in Vietnam, the Law Officer (the rough equivalent of a judge), Colonel Earl V. Brown, observed that there was an “endemic” propensity toward torture and a “rather careless attitude toward life” held by the peoples of Southeast Asia.¹⁴⁹ Perhaps most infamously, General William Westmoreland, commander of U.S. forces in Vietnam, articulated this notion when he said, “[t]he Oriental doesn’t put the same high price on life as does the Westerner. Life is plentiful, life is cheap in the Orient. As the philosophy of the Orient expresses it, life is not important.”¹⁵⁰ Such sentiments constituted a blank check for savage war.

Finally, by othering torture, we fail to recognize and acknowledge our own responsibility for what has happened to the victims. This failure to accept responsibility gives us a dangerously distorted sense of our past and

¹⁴⁷ YOUNG, *supra* note 89, at 174.

¹⁴⁸ *Id.* (emphasis in original) (quoting Jonathan Schell).

¹⁴⁹ Transcript of Record at 979, 1000, United States v. Levy, 39 C.M.R. 672 (1968). *Cf.* SLOTKIN, GUNFIGHTER NATION, *supra* note 26, at 528-29.

¹⁵⁰ CHRISTIAN G. APPY, WORKING-CLASS WAR: AMERICAN COMBAT SOLDIERS AND VIETNAM 254 (1993).

of ourselves.¹⁵¹ It also harms the victims a second time, by failing to take seriously their memory of harm. In the case of Vietnam, this failure to accept responsibility for our actions was connected to a tendency to read the Vietnamese out of the picture altogether.¹⁵² In tallying the costs of the Vietnam War, for instance, former Secretary of Defense Robert McNamara focused exclusively on the costs to the United States, despite the enormous loss of life and resources and the enormous harm to Vietnamese economy, society, and environment caused by the war.¹⁵³ Americans, in other words, have often framed their understanding of the war to be a story of American good intentions and American victimization.¹⁵⁴

The Russian roulette scenes in Michael Cimino's 1978 academy-award-winning film, *The Deer Hunter*, are especially vivid instances of the othering of atrocity and the representation of the notions of American innocence and victimization.¹⁵⁵ One of the iconic images of the Vietnam War is the point-blank execution of a captured and bound National Liberation Front prisoner during the Tet offensive of 1968, by Chief of the National Police, General Nguyen Ngo Loan.¹⁵⁶ General Loan's execution of this prisoner on a Saigon street, with a pistol shot to the temple, was captured both by still photograph and film and seen the next day by millions of Americans.¹⁵⁷ As Bruce Franklin shows, Cimino clearly borrows from this image, but in his Russian roulette scenes, he inverts the image of Loan's execution of the prisoner.¹⁵⁸ Americans, not a Vietnamese prisoner of the American sponsored government of South Vietnam, become the victims.¹⁵⁹ Cimino first introduces this imagery in a scene in which captured American

¹⁵¹ I discuss this failure to accept responsibility more fully in Robert Strassfeld, *Robert McNamara and the Art and Law of Confession: "A Simple Desultory Philippic (Or How I Was Robert McNamara'd into Submission)"*, 47 DUKE L.J. 491 (1997).

¹⁵² See *id.* at 559-560.

¹⁵³ On Robert McNamara's tendency to ignore the Vietnamese in his retrospective account of the Vietnam War, see *id.* at 559-60.

¹⁵⁴ See *id.* at 559.

¹⁵⁵ THE DEER HUNTER (Universal Studios 1978).

¹⁵⁶ H. BRUCE FRANKLIN, VIETNAM AND OTHER AMERICAN FANTASIES 14 (2000).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 14-16 (discussing THE DEER HUNTER, *supra* note 155). As Bruce Franklin describes, the inversion of the image of General Loan shooting a bound prisoner is but one of several instances where Cimino takes iconic images of the Vietnam War and turns them on their heads. *Id.* at 15-17. For instance, the American prisoners are kept in Tiger Cages, which as described above, were used by the South Vietnam government, under the direction of the same General Loan and, not by the National Liberation Front. *Id.* at 16.

¹⁵⁹ *Id.* at 15-16 (discussing THE DEER HUNTER, *supra* note 155).

soldiers are forced by the enemy to play Russian roulette.¹⁶⁰ At the dramatic climax of the film, we encounter a gambling den in Saigon where Vietnamese, Chinese, and Caucasians who have “gone native” all wager on the deadly game.¹⁶¹ Once again, as in the earlier scene, the victim is American, not Vietnamese.¹⁶² By this point, however, it is not simply a cruel enemy who is the perpetrator.¹⁶³ The operators of the gambling den are Chinese businessmen, and the gamblers are not North Vietnamese or National Liberation Front soldiers but our “allies,” the people of South Vietnam.¹⁶⁴ The victim, Nick, an American soldier, who survived the Russian roulette game as a prisoner, has sunk into the depths of self-destruction as a response to his Vietnam experience and is beyond his friend Michael’s efforts to save him.¹⁶⁵ In Cimino’s vision, Vietnam is a place where innocent Americans go and get hurt or destroyed.

4. White Trash Talking: The “Other” America

*“They weren’t even pretending to get information out of them. It was recreational white-trash torture.”*¹⁶⁶

*“We’ve got some hillbilly kids out of control.”*¹⁶⁷

Of course, we know that Americans have engaged in prisoner abuse. Here too, however, we see a process of distancing and othering. As of the fall of 2005, there have been over 400 criminal investigations into allegations of detainee abuse.¹⁶⁸ One hundred fifty U.S. soldiers have been subjected to non-judicial punishment for their participation in detainee abuse, and military authorities have referred charges to courts-martial in the cases of seventy-four other soldiers.¹⁶⁹ Nevertheless, press coverage has focused overwhelmingly on two reservists, Specialist Charles Graner, Jr., and Private First Class Lynndie England.

¹⁶⁰ *Id.* at 16 (discussing *THE DEER HUNTER*, *supra* note 155). The mistreatment of American POW’s is well documented. To the best of my knowledge, however, this scene is pure fabrication, as I know of no evidence that American POW’s were forced to play Russian roulette.

¹⁶¹ *THE DEER HUNTER*, *supra* note 155.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Topic A with Tina Brown: Let the Countdown Begin*, *GAWKER*, May 9, 2005, <http://www.gawker.com/news/media/tina-brown/topic-a-with-tina-brown-let-the-countdown-begin-102669.php> (quoting Christopher Hitchens on Abu Ghraib).

¹⁶⁷ Senior Intelligence Official to Seymour Hersh. *HERSH*, *supra* note 54, at 362.

¹⁶⁸ Human Rights First, *Torture: Quick Facts*, http://www.humanrightsfirst.org/us_law/etn/misc/factsheet.htm#_ednref7.

¹⁶⁹ *See id.*

This focus on Graner and England has conveniently allowed Americans and the military to indulge in the “few bad apples” notion. Moreover, the characterization of the two has fostered a process of distancing these bad apples from the rest of us. The image of Graner and England that emerges is that of stereotypical “white trash.” Lewis Lapham says of them that they were “both looking not for a way into the halls of military glory but for a way out of the hollows of Appalachian poverty.”¹⁷⁰

Press coverage of Graner has focused on his messy divorce, his threats to and physical abuse of his ex-wife, and the three protective orders necessitated by his threatening behavior.¹⁷¹ His troubled work life as a prison guard in a Pennsylvania Super Max prison, where there were allegations of sadistic conduct toward prisoners, has also garnered considerable attention; though they have regrettably not prompted much discussion of prisoner abuse in the United States.¹⁷²

If anything, the depiction of England, dubbed “the trailer-park torturer,” has played into white trash stereotypes even more than those of Graner.¹⁷³ Accounts typically mention her origins in a “one-stoplight town” in West Virginia.¹⁷⁴ There, she grew up in a trailer park, down a dirt road from a saloon and a sheep farm.¹⁷⁵ She married early and unsuccessfully and worked for a time on the nightshift in a chicken processing plant.¹⁷⁶ Prosecution witnesses described her as “undisciplined and promiscuous.”¹⁷⁷ Partly due to her defense strategy, she is depicted as at best learning disabled and speech impaired, perhaps due to oxygen deprivation at birth.¹⁷⁸ We are told that she was unable to speak in complete sentences until age

¹⁷⁰ Lewis H. Lapham, *Condottieri*, HARPER'S MAG., June 1, 2005.

¹⁷¹ See, e.g., Michael A. Fuoco et al., *Suspect in Prisoner Abuse Has a History of Troubles; Whitehall Native Had Checkered Work Record, Stormy Marriage*, PITT. POST-GAZETTE, May 8, 2004, at A1.

¹⁷² See, e.g., *id.*; Ron Martz, *President Bush Apologizes: “Sorry for Humiliation”*, ATLANTA J.-CONST., May 7, 2004, at A1. For a much more nuanced treatment of Graner, see Paul Lieberman & Dan Morain, *Unveiling the Face of the Prison Scandal*, L.A. TIMES, June 19, 2004, at A1.

¹⁷³ Jennifer Wells, *Leashes, Lynchings and Lyndie England*, TORONTO STAR, Feb. 20, 2005, at A12.

¹⁷⁴ See, e.g., Alexandra Rocky Fleming, *A Soldier, a Mother—and a Court-Martial*, PEOPLE, May 16, 2005, at 105; Ariel Sabar, Gus Sentementes & Jeff Barker, *Families of the 372d Tormented by Stories of POW Abuses in Iraq*, BALTIMORE SUN, Apr. 30, 2004, at 1A.

¹⁷⁵ Sabar et al., *supra* note 174; Dianne Williamson, *Horrors of War Tar Women, Too*, WORCESTER TELEGRAM & GAZETTE, May 9, 2004, at B1.

¹⁷⁶ Dennis Cauchon et al., *Abuse Scandal Meets Disbelief in Hometowns*, USA TODAY, May 7, 2004, at A6; Martz, *supra* note 172.

¹⁷⁷ *Iraqi Detainees Identify England As Their Abuser*, CHIC. TRIBUNE, Aug. 6, 2004, at 10.

¹⁷⁸ *Defense Urges Leniency in Soldier's Sentencing*, L.A. TIMES, May 4, 2005, at A25; see also Fleming, *supra* note 174.

seven.¹⁷⁹ She is variously described as either “a fool in love” easily led by Graner or as sharing with him a taste for sexual sadism.¹⁸⁰

The depiction of the two gets a Jerry Springeresque twist because of the tawdry relationship between them, complicated by a love-triangle involving a third reservist at Abu Ghraib.¹⁸¹ We learned from the press that among the originally unreleased Abu Ghraib photographs were pictures of Graner’s and England’s sexual escapades.¹⁸² Indeed, some of the sexually-oriented prisoner abuse photographs were purportedly intended by Graner as a birthday gift to England.¹⁸³ Moreover, England turned out to be pregnant, and she asserted that Graner is the child’s father.¹⁸⁴ Graner denied paternity of the child.¹⁸⁵ Graner, however, spurned England and married Specialist Megan Ambuhl, another reservist involved in the Abu Ghraib scandal.¹⁸⁶

Whether or not the depictions of Graner and England accurately capture them, the media focus on those two from amongst all the Americans accused of prisoner abuse, reinforces the official response that the events at Abu Ghraib were aberrational and do not represent America. Prisoner abuse becomes the sadistic diversion of “trailer trash.” Though the American faces in the Abu Ghraib pictures may look like ours, the representation of Graner and England allows many Americans to use class, geography, lifestyle, and education to distance themselves from torture and abuse.

IV. THE END OF AMERICAN INNOCENCE?

O’ beautiful, for spacious skies
 But now those skies are threatening
 They’re beating plowshares into swords
 For this tired old man that we elected king
 Armchair warriors often fail
 And we’ve been poisoned by these fairy tales
 The lawyers clean up all details

¹⁷⁹ Michelle Saxton, *Symbol of Prison Scandal to Plead Guilty*, BERGEN COUNTY (N.J.) RECORD, May 1, 2005, at A6.

¹⁸⁰ Fleming, *supra* note 174; Cauchon et al., *supra* note 176; Richard A. Serrano, *Female Reservist to Plead Guilty*, L.A. TIMES, Apr. 30, 2005, at A10; *Defense Urges Leniency in Soldier’s Sentencing*, *supra* note 178; *Iraqi Detainees Identify England As Their Abuser*, *supra* note 177. See generally Martz, *supra* note 172.

¹⁸¹ See Fleming, *supra* note 174.

¹⁸² Robert H. Reid, *New Abu Ghraib Images Aired*, CHICAGO SUN TIMES, Feb. 16, 2006, at 28.

¹⁸³ *Graner Led Abuse at Abu Ghraib, Witnesses Testify*, CHIC. TRIB., Jan. 11, 2005, at C7.

¹⁸⁴ Fleming, *supra* note 174.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Since daddy had to lie

.....

But this is the end

*This is the end of the innocence*¹⁸⁷

*"The age of innocence is fading like an old dream"*¹⁸⁸

What do we mean by American innocence? As described above, it is a notion of American exceptionalism, a freedom from the legacies of feudalism and monarchy, from the constraints of history, a new start for new men in a new land. To be sure, there are things that are unique to the American experience, but it is a mistake to be blinded by those differences. America's past, like the past of other countries, is hardly innocent; though we hold onto to the trope of innocence fiercely.

Innocence can also mean naiveté. We talk of the innocence of youth. It is the state of being before learning about one's surroundings and before confronting evil. The Americans of Henry James' novels are such innocents, unprepared for their experiences abroad.¹⁸⁹ Innocence tends to lead to the undoing of James' American protagonists. It is necessary for them, like Adam, to experience a fall, caused by their inexperience and lack of understanding, but in the end, the fall opens up the possibility for growth and the beginning of understanding.¹⁹⁰

After September 11, 2001, it became commonplace for people to say that on that terrible date America lost its innocence. It is not altogether clear, however, what precisely the proclaimers of the loss of American innocence had in mind. Some have responded to such claims by reminding the speakers that we have heard this all before. Just as proclamations of American innocence is a recurrent theme in our national self-depiction, so too are periodic statements of the loss of innocence.¹⁹¹ Yet, we hear the refrain of the loss of innocence so often that, perhaps, we need to give it some credit.

Do either of the senses of "loss of innocence" discussed above describe America in the aftermath of September 11th? The first version of "American innocence" grossly overstates the flawlessness of our character

¹⁸⁷ DON HENLEY, *The End of the Innocence*, on THE END OF THE INNOCENCE (Geffen Records 1989).

¹⁸⁸ IRON MAIDEN, *Age of Innocence*, on DANCE OF DEATH (Columbia Records 2003).

¹⁸⁹ See R.W.B. LEWIS, *supra* note 40, at 152-55.

¹⁹⁰ *Id.*; see also Emory Elliott, 2003 Mellon Annual Lecture at the John Hope Franklin Humanities Institute at Duke University: National Dreams and Rude Awakenings: The American Myths of Isolation and Innocence (Feb. 28, 2003).

¹⁹¹ See, e.g., Dick Crepeau, *Lost and Found*, POPPOLITICS.COM, Oct. 1, 2001, www.poppolitics.com/articles/2001-10-01-innocence.shtml; Elliot, *supra* note 189. For a poetic expression of this idea, see Therese Baumberger, *The Death of American Innocence*, UNITARIAN UNIVERSALIST ASS'N, Sept. 15, 2001, http://www.uua.org/news/2002/91102/pr_ayer5.html.

and history. The second version is quite unflattering. Is there any other way we might meaningfully talk about loss of American innocence?

Unlike collective America, Americans do lose their innocence, especially in times of crisis and war. The literature of the Vietnam War, and probably the literature of all wars, tells the story of innocence lost and disillusionment.¹⁹² In yet another sense, sending our young to fight often leads to a loss of innocence. After watching her son, Paul Meadlo, a participant in the My Lai massacre, tell his story on the CBS evening news, his mother, Myrtle Meadlo, painfully told CBS reporter Ike Pappas:

He wasn't raised up like that . . . I raised him up to be a good boy and I did everything I could. They come along and took him to the service. He fought for his country and look what they done to him—made a murderer out of him, to start with.¹⁹³

Clearly in the wreckage of war, innocence is lost. Yet, that is also not what the post-September 11th talk of loss of innocence refers to.

Rather, our focus seems to be on a new sense of vulnerability, coupled, perhaps, with a strong sense of surprise at the existence of people who would do us harm. Here too, this “new” sense is not altogether new. One can point to the War of 1812 and the Civil War for instances where the fate of the Republic seemed precarious. For many, Pearl Harbor is a memory, rather than a page in a history book. Moreover, many of us remember the nuclear anxieties of the Cold War, anxieties that run sufficiently deep that the Bush Administration played on them successfully in the run up to the Iraq War. Nevertheless, there does seem to be a greater sense of vulnerability and anxiety. Our loss of innocence is our recognition that we are not wholly apart from the world and safe because of the buffer of two oceans. While our sense of vulnerability is undoubtedly exaggerated, and at times manipulated, it is also part of the current American worldview.

The question then is what we should do in the face of such anxiety? Do we pronounce a new maturity that entails adopting a hard-nosed “gloves are off” realism? Do we attempt to recapture our innocence by enveloping this supposed realism in a Wilsonian missionary idealism that promises to spread democracy throughout the world? Or do we join the world of nations, not as hegemon, but as partner? If we hope to do the latter, we best abandon torture, by proxy or otherwise.

¹⁹² See generally APPY, *supra* note 150.

¹⁹³ MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* 263 (1992) (quoting Mrs. Myrtle Meadlo).

V. CONCLUSION

To illustrate the concept of the division of labor, Adam Smith describes in *An Inquiry into the Nature and Cause of the Wealth of Nations* how the process of pin making has changed.¹⁹⁴ In a wonderful passage, he describes the various components of pin-making and then calculates the efficiencies gained by dividing the job into as many as eighteen different tasks.¹⁹⁵ Today, law professors are again talking about pins, or at least needles, as they muse about non-lethal, but effective means of torture, and suggest sterilized needles, "shoved under the fingernails," as a possible method of torture.¹⁹⁶ To be sure, the connection between the contemporary discussions of permissible torture techniques to Smith's insights on division of labor is purely coincidental, not deliberate. Yet the coincidence is frighteningly suggestive of the logic of extraordinary rendition. Torture by proxy, however efficient, is still torture, no matter how many steps we remove ourselves from the interrogation room.

Extraordinary rendition, though a recent practice, has an old history of denial of responsibility and protests of innocence. It is anything but innocent. If there is anything salvageable in the notion of American innocence, perhaps it is in the aspiration, rather than in its mechanical assertion. In the matter of torture, we might start by returning to Patrick Henry's admonition with which this article began, that it is not only our past (or our myths about the past) that matter, but what we do today.

¹⁹⁴ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 4-5 (Random House 1937) (1776).

¹⁹⁵ *Id.*

¹⁹⁶ DERSHOWITZ, *supra* note 48, at 148-49.