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Holding the High Ground: The Operational Calculus of Torture and Coercive Interrogation

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BRIAN D. ECK**

*He who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will gaze also into thee.*¹

INTRODUCTION

This Article considers an apparent inconsistency in some recent objections to torture that have been raised in the context of national security concerns. These objections often depend on the notion that torture's object is precisely not just to damage but to destroy a human being's power to decide for himself what his loyalty and convictions permit him to do[;] . . . to reduce its victim to a screaming animal for

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1. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL: A PRELUDE TO THE PHILOSOPHY OF THE FUTURE* 52 (Helen Zimmern trans., Dover Pubs. 1997) (1886).

whom decision is no longer possible—the most profound insult to his humanity, the most profound outrage of his human rights.²

This objection, however, is inadequate because it does not clearly account for the fundamental purpose of interrogation, and therefore for modern torture. Modern torture is not undertaken to punish a wrongdoer or to give pleasure to a sadist or tyrant, but rather to compel the subject to reveal secrets of tactical value.³ This compulsion depends on a simple calculus: the will to resist must be less than the pressure to reveal.⁴ The former is sapped and the latter increased by breaking the subject's bonds with the outside world ("regression"), totally isolating the subject within himself—a condition that is utterly abhorrent to human nature⁵—and then re-establishing the subject's connection with the world in such a way that compliance becomes palatable ("rationalization").⁶ Thus, as the Central Intelligence Agency's interrogation manual notes, maiming and bludgeoning a subject is often counterproductive to the long-term goal of reforming the subject's will.⁷

Our point of departure from the above objection is this: the most profound insult to someone's humanity is not to make him a screaming animal (i.e., to render him *incapable* of decision); instead, it is the successful attempt to *compel* his will so that he believes what it is *expedient* that he believe. Likewise, the evil most difficult to uproot is not that of taking pleasure in the abjection of another, but the belief that such abjection is necessary for the common good. Accordingly, modern torture could become worse than blowtorches and bamboo cages used for terror or orthodoxy or even pleasure. Since modern torture is simply a tool to bring about a certain result—i.e., a re-education that could be characterized as a more subtle and lasting form of slavery—the objection noted above is inadequate insofar as it is merely a gut response to the brutality of the methods involved. And inadequate objections may lead to permissible scenarios and unfounded justifications.

2. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 38-39 (2006).

3. See EDWARD PETERS, TORTURE 114-16 (2d ed. 1996).

4. CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION 82 (1963), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/01-01.htm>.

5. See generally Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006) (noting the harmful psychological effects of solitary confinement in prisons and in isolated situations such as Arctic facilities).

6. CIA, *supra* note 4, at 82-85.

7. *Id.* at 64.

Torture is obviously a timely subject and it has attracted the attention of many able scholars who have investigated and chronicled the issues surrounding its use in the War on Terror.⁸ Although some recent commentators appear to pass over the deeper considerations about modern torture, others identify more substantial objections by considering torture's effects on human dignity.⁹ These objections to torture, however, are only partially adequate and fail to appreciate the effect the permissive use of torture has on the *esprit de corps* of our soldiers and the moral certitude of our country. The analysis offered by the Judge Advocates General of the U.S. armed forces in response to the Office of Legal Counsel's 2003 Working Group Report¹⁰ points toward a more adequate objection to torture by (among other things) considering these effects.¹¹

In Part I of this Article, we first consider some of the strengths and weaknesses of the partially adequate objections. In Part II, we explore torture in light of the biological distinction between pain and suffering and consider the implications of that distinction for our understanding of free will and the fighting spirit. Finally, in Part III, we suggest a more fundamental view of torture that navigates between the Scylla of naive moralizing and the Charybdis of ticking time-bombs. We propose that the debate should focus on torture's effect on our country's moral certainty, on the fighting spirit of our armed forces, and on our overall strategy in combating asymmetric foes and jihadist extremism. This notion of torture will cast an important part of the discussion in sharper relief while providing a clearer norm for those who make and execute policy to defend our nation from terrorism.

I. INADEQUATE OBJECTIONS TO TORTURE

The treatment of detainees at Bagram Air Base in Afghanistan, Abu Ghraib prison and Camp Bucca in Iraq, and many secret "black sites" across the world has sparked a heated debate about torture and

8. See, e.g., TORTURE: A COLLECTION (Sandford Levinson ed., 2004).

9. See, e.g., Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881 (2005).

10. WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>.

11. See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com/2005/07/jag-memos-on-military-interrogation.html> (July 27, 2005, 08:08 EST) (providing the text of the various JAG memoranda).

coercive interrogation.¹² Although several others have meticulously chronicled recent events,¹³ renowned historian Edward Peters wrote a thorough and insightful analysis of torture, tracing the phenomenon from Ancient Greece to Rome, from medieval Europe to modern nation-states.¹⁴ Peters noted that after the moral reforms that overturned the darker practices of the *ancien régime*, the word *torture* gradually lost its meaning to sentimentality.¹⁵ Professor David Luban came to a similar conclusion years later, noting that “for the first time [we may] find it possible to view torture from the torturer’s point of view rather than the victim’s.”¹⁶ Thus, it would be both theoretically and historically absurd to claim that torture has passed from the world. For the Third Reich, the moral sentiment of the race (*Volksgeist*) was a sufficient guide and justification for whatever means became necessary; communist Russian revolutionaries relied on the dictatorship of the proletariat to justify torture; and the French resorted to torture due to the exceptional circumstances presented by the conflict in Algiers.¹⁷ Likewise, torture seems far more historically

12. See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

13. E.g., KAREN J. GREENBERG, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (2005).

14. See PETERS, *supra* note 3.

15. See *id.* at 148–51 (explaining that “[t]he nineteenth-century language of morality and sentiment, expanded and applied to increasing kinds and numbers of human relationships, widened the applicability of the term to all areas of human brutality, from the workplace to the home,” thus gutting the legal definition of “torture” and substituting for it a “vague idea of moral sentiment”); cf. Sherry F. Colb, *Why Is Torture “Different” and How Different Is It?*, 30 *CARDOZO L. REV.* 1411, 1433 (2009) (outlining a thought experiment in which “torture” simply means inflicting severe pain).

16. David J. Luban, *Liberalism and the Unpleasant Question of Torture*, 91 *VA. L. REV.* 1425, 1439 (2005). Luban suspects that, historically speaking, intelligence gathering has been

the least common motivation for torture, and thus the one most readily overlooked. And yet it alone bears no essential connection with tyranny. This is not to say that the torture victim experiences it as any less terrifying, humiliating, or tyrannical. The victim, after all, undergoes abject domination by the torturer. But it will dawn on reluctant liberals that the torturer’s goal of forestalling greater evils is one that liberals share. It seems like a rational motivation, far removed from cruelty and power-lust.

Id. at 1439.

17. See generally PETERS, *supra* note 3, at 105–40. Peters goes on to provide the following historical commentary:

Blackstone’s observation that in England torture was the engine of the state, not of law, was indeed true as far as it went. But the revolutionary state of the twentieth century was something that Blackstone could not have imagined.

consistent with America's ethics and national character than our condemnations would otherwise suggest. Starting with the beginning of the twentieth century, Professor John Parry chronicles allegations of torture by the United States in the Philippines,¹⁸ at the start of the Cold War,¹⁹ in Vietnam,²⁰ in Latin America,²¹ and within the domestic police forces and prisons.²² He also traces the reservations and limitations of the various laws against torture and concludes that "the appropriate descriptive narrative for torture and abuse in the war on terror is less one of disjuncture and more one of continuity with the rule of law as a domestic practice."²³

Infinitely more wealthy and powerful, moved by ideologies that excited more and more of its citizens, possessed of organs of intelligence that could dispense with traditional divisions of authority, the coercive revolutionary state of the twentieth century could introduce torture into any or all of its procedures, for it had developed not only new powers, but a new anthropology. In place of the rights of man and citizen, there was substituted the exclusive right of the *Volk* or the Revolution. Against these, the fragile barriers in which the late eighteenth- and nineteenth-century thinkers and jurists had misplaced so much faith began to crumble more quickly than they had ever dreamed possible.

. . . .

. . . Everyone understood perfectly by 1957 how torture had come to be used in the Third Reich, and even (Krushchev had delivered his speech to the Twentieth Party Congress in 1956) in the USSR during the Revolution and the period of Stalin's solidification of his own rule. But that French officials should practice torture upon Algerians and French citizens, that it was not merely the military, but the police who used it The publicity attendant upon the revelations of 1957 and after brought the question of torture out of the arm's-length land of despised and sub-human enemies into the streets of Paris and the prisons of Algiers. Even the democratic West was no longer immune from what Sartre called the plague of the twentieth century.

Id. at 130-31, 134.

18. John T. Parry, *Torture Nation, Torture Law*, 97 *GEO. L.J.* 1001, 1005-08 (2009).

19. *Id.* at 1008-11.

20. *Id.* at 1011-14

21. *Id.* at 1014-16.

22. *Id.* at 1016-28.

23. *Id.* at 1056. Specifically, Parry noted that

[b]efore September 11, ideas of the rule of law, legitimate government conduct, and sovereign power—not to mention notions of decency—had already evolved to make room for the kinds of practices that are routine in police work and in maximum security and supermax prisons. That is to say, the facilities, rules, and practices that exploded into public view at Abu Ghraib and Guantánamo are not so very different from those that have operated and continue to operate on a much larger scale within the United States.

Id.

Nevertheless, on the surface, our nation's legal standards on torture reflect a clear and strident rejection of it in all forms.²⁴ In signing the Convention Against Torture, the United States agreed that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."²⁵ But the United States ratified it subject to certain limitations on what constitutes torture.²⁶ As Professor Parry noted, these and other limitations were designed to permit as much coercive conduct as possible, as they

24. Professor Huhn has explained this view:

Common Article 3 of the Geneva Convention Relative to the Treatment of Prisoners of War, which the Senate unanimously ratified in 1955, prohibits the parties to the treaty from acts upon prisoners including "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular, humiliating and degrading treatment." Second, the International Covenant on Civil and Political Rights, which the Senate ratified in 1992, states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Third, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, which the Senate ratified in 1994, provides that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," and that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture"

Wilson R. Huhn, *Waterboarding Is Illegal*, WASH. U. L. REV. COMMENTARIES (May 10, 2008), <http://lawreview.wustl.edu/slip-opinions/waterboarding-is-illegal> (footnotes omitted) (alterations in original).

25. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

26. In order for an act to constitute torture under the Convention Against Torture, the act

must be *specifically* intended to inflict *severe* physical or mental pain or suffering and that mental pain or suffering refers to *prolonged* mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt *profoundly* the senses or the personality; (3) the threat of *imminent* death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt *profoundly* the senses or personality.

Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations, 101st Cong. 58 at 10 (1990) (statement of Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State) (emphasis added). The United States further instituted its obligations by passing the War Crimes Act, a "Prohibition on Cruel, Inhuman, or Degrading Treatment or

construct a sharp dichotomy between horrific acts that amount to torture and other forms of conduct. Torture would become a category with few gray areas, because it would encompass only the worst of the worst—conduct that everyone assumed was not only already illegal but also almost never practiced in the United States. In the process, more debatable categories of conduct would be shunted aside and apparently relegated en masse to the lesser category of cruel, inhuman, or degrading treatment. At the same time, [the Executive Branch] also sought to limit the scope of the cruel, inhuman, and degrading treatment category—which they reasonably viewed as ambiguous. The result of their efforts was to take some of the conduct that arguably would fall within the Convention and place it outside, at least under the United States’ understanding of its obligations. Put differently, the Executive Branch sought to raise the bar for establishing that either torture or cruel, inhuman, and degrading treatment had taken place.²⁷

Although there may be a legal necessity for distinguishing torture from cruel, inhuman, or degrading conduct, there is a greater need for maintaining what an ancient commentator called the *Tao* (or moral law) and what our military calls the moral high ground.²⁸ It was this distinction that contributed to the coercive interrogation undertaken shortly after 9/11 and during our subsequent invasion of Afghanistan and Iraq. The document referred to by some scholars as the “Bybee Memorandum” was commissioned in response to a growing recalcitrance from key al-Qaeda captives,²⁹ and it appears to have exploited the “gray areas” noted above as much as conceivably possible.³⁰

Naturally, when the interrogations undertaken pursuant to this memorandum came to light, many commentators strenuously objected. Some scholars have categorized the objections to torture based on their philosophical underpinnings. For example, Professor Louis Seidman made a useful distinction between “High-Minded Moralists” who reject torture on a deontological ground and “Sophisticated

Punishment of Persons Under Custody or Control of the United States Government” and “Additional Prohibition on Cruel, Inhuman or Degrading Treatment or Punishment.” 18 U.S.C. § 2441 (Supp. 2006); 42 U.S.C. § 2000dd (Supp. 2006); 42 U.S.C. § 2000dd-0 (Supp. 2006).

27. Parry, *supra* note 18, at 1042.

28. SUN TZU, *THE ART OF WAR* 1 (Lionel Giles trans., Special Edition Books 2009) (circa 500 B.C.); see also U.S. DEP’T OF ARMY, FIELD MANUAL NO. 3-24: COUNTERINSURGENCY 7-2 to 7-3 (2006) [hereinafter COUNTERINSURGENCY MANUAL], available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

29. Kathleen Clark, *Lawyers’ Roles and the War on Terror*, 1 J. NAT’L SECURITY L. & POL’Y 455, 457-58 (2005).

30. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 72 (Karen J. Greenberg ed., 2008).

Machiavellians” who wish to use torture but balk at the consequences of publicly acknowledging its use.³¹ He notes that moralists often engage in a form of willful blindness. While they make “symbolic statement[s] about [torture’s] absolute unacceptability” and reject it as an article of faith, moralists refuse to consider suffering that might be caused by failing to use it.³² On the other hand, Machiavellians “purport to understand what the Moralists ignore—the possibility that torture might sometimes work and might sometimes produce benefits that make it worth the price.”³³ But Machiavellians still want to keep torture out of the public eye because they think debate will result in “too much [torture,] because torture will then be legitimated; [or] too little because public revulsion will get in the way of dirty work that has to be done.”³⁴

On the other hand, a few commentators have contended that coercive methods can be properly contained and should or must be employed in the War on Terror. For instance, Professors Eric Posner and Adrian Vermeule contended that coercive interrogation should be legal and regulated:

[C]oercive interrogation is not special at all. If it is agreed that coercive interrogation is justified in certain circumstances, even narrow circumstances, there is no sense in treating it as “illegal” but subject to ex post political or legal defenses. It should be made legal, albeit subject to numerous legal protections—again, in this way like police shootings, wartime killings, preventive detentions, capital punishment, and other serious harms. The law should treat coercive interrogation the way it typically treats coercive governmental practices. Such practices are subject to a standard set of regulations defined ex ante: punishment of officials who use these instruments without a good justification, official immunity when they are used in good faith, various restrictions on the type of instrument that may be used, ex ante protections such as warrants, and so forth.³⁵

Professor Alan Dershowitz also made a noteworthy point—which he felt the need to repeat in the face of widespread and probably misguided outrage³⁶—when he argued that, since coercive interrogation is virtually certain to go on whether or not we approve of it, we should

31. Seidman, *supra* note 9, at 883.

32. *Id.* at 883.

33. *Id.* at 885.

34. *Id.*

35. Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 674 (2006) (footnote omitted).

36. Alan Dershowitz, *Tortured Reasoning*, in TORTURE, *supra* note 8, at 257, 265–66 (noting that Professor Dershowitz was called “Torquemada Dershowitz” among other

try to minimize its occurrence by seeking warrants for its use.³⁷ Of course, *ex ante* review and torture warrants give rise to more questions about the “routinization” or calcification of using coercive interrogation,³⁸ but we agree that the country needs “a candid and serious engagement with the advantages and disadvantages of torture.”³⁹ We contend that many of the arguments for and against coercive interrogation do not fully address the nature of interrogation and thus fail to contend adequately with problems that go beyond tormenting the body of a defenseless prisoner, such as torture’s effect on the overall strategy of counterinsurgency, on our country’s moral certainty, and on our warfighters’ *esprit de corps*. Thus, many current objections cannot properly answer whether or when torture is permissible as circumstances change.

II. PAIN, SUFFERING, AND THE PROBLEM OF FREE WILL

This part begins with a summary of the physical basis of pain. The cellular and physiological events that give rise to the perception of pain are too complex to address here in full;⁴⁰ suffice it to say that distant fibers of various types transmit electrical action potentials when stimulated.⁴¹ When they fire depends on the type of cell to which they are attached: some fire in response to a change in temperature, while others fire in response to pressure, vibration, and so on; some encode damage to the skin (sharp pain), others to tendon and bone (aches), and others to viscera.⁴² Distant fibers transmit information in response to pain immediately by transient action potentials and slowly by longer-acting chemical signals, propagating the signal upwards to the dorsal root of the spinal cord.⁴³ The spinal cord receives these signals from the dorsal root and transmits them upward via three tracts—two directed to specific areas of the cortex (the conscious mind) through the thalamus and a third to the periaqueductal gray matter in the midbrain (which releases opioids to block pain sig-

things in response to his suggestion that torture will occur and that it should be regulated rather than ignored).

37. *Id.* at 257.

38. *See infra* notes 92–97 and accompanying text.

39. Seidman, *supra* note 9, at 885.

40. For an excellent but relatively brief explanation for the layman, see PATRICK DAVID WALL, PAIN: THE SCIENCE OF SUFFERING 31–41 (2000).

41. ERIC KANDEL, PRINCIPLES OF NEURAL SCIENCE 472 (5th ed. 2008).

42. *Id.* at 473–74.

43. *Id.* at 474.

nals).⁴⁴ Other areas of the brain project across the cortex and downward to the dorsal root and thus have a profound and interrelated impact on the signals that reach the cortex.⁴⁵ The interaction between these functional elements gives rise to the complex cognitive experience everyone knows as pain.

Because many areas interact with the pathways that encode pain, the experience of pain is highly dependent on the physiology, history, and cognitive state of the subject.⁴⁶ The thalamus may have particular relevance for the interaction between the raw signal indicating damage and the experience of pain insofar as it is the gateway through which most pain signals reach the cortex. In fact, each mode of sensation (smell, sight, etc.) has a parallel pathway to the thalamus, and the somatosensory cortex has pathways that reach back to the thalamus.⁴⁷ Thus, the conscious mind interacts with painful stimuli; it is subject to pain signals and acts upon them, within the brain, and at the junction of distant fibers and the spinal cord.

In light of studies on the personal experience of this interaction, pain questionnaires often focus on categorizing a patient's entire experience of pain in terms of its sensory, affective, and evaluative aspects—i.e., the stimulus itself (hot, burning, scalding, searing), what the stimulus did to the subject (exhausting, sickening, punishing), and the degree of suffering involved (annoying, miserable, unbearable).⁴⁸ While there is clearly a neurological basis for the evaluation of pain even before the subject is truly conscious of it,⁴⁹ the subject's *ex post* comprehension of the situation is also critical to the synthetic experience of pain.⁵⁰ This biological reality points to an important theoretical distinction: coercion, which occurs when an interrogator overloads a detainee's will by magnifying the cognitive experience of pain while inhibiting the detainee's self-control, is impermissible when the *source of pressure* or the *mode of inhibiting self-control* is dehumanizing, regardless of the brutality of the particular technique used. This distinction allows one to approve the technique employed in the "Chris-

44. *Id.* at 475, 482.

45. *See id.* at 480-85.

46. *Id.* at 481, 483.

47. *Id.* at 343, 483.

48. *See* WALL, *supra* note 40, at 27-29. An unusual condition called asymbolia for pain arises in patients who have lesions of the insular cortex: they simply do not care when exposed to painful stimuli. *See* KANDEL, *supra* note 41, at 482.

49. ERIC KANDEL, *IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF MIND* 343-44 (2006).

50. KANDEL, *supra* note 41, at 481-82.

tian burial case”⁵¹—pressure with its source in the suspect’s own moral notions, unmagnified by severe disturbances to the suspect’s homeostatic condition—while rejecting relatively clear instances of coercion and forced confession based on mock executions, starvation, sedation, or prolonged sleep deprivation.⁵²

Obviously, physical torture has long-lasting sequelae ranging from permanent disfigurement to persistent mental trauma.⁵³ One recent survey of refugees compared the sequelae from physical and psychological methods of torture and concluded that psychological torture produced more persistent sequelae than physical torture.⁵⁴ Likewise, the European Court of Human Rights found that terrorism suspects swept up by the dragnet in Northern Ireland manifested significant sequelae after being subjected to the “five techniques.”⁵⁵ While the court determined that the techniques were cruel, inhuman, and degrading but not torture,⁵⁶ the captured Irishmen appear to have suffered long-lasting harm consistent with that noted in victims of torture.⁵⁷ In any event, it is clear that people who have suffered prolonged pain show substantial changes in the architecture of their brains.⁵⁸ Studies on the effect of learned fear in mice suggest that some of these changes involve sensitization and up-regulation of the regions that initially detected the stimulus.⁵⁹ These studies coincide with an intuitive conclusion that psychological coercion will have persistent deleterious effects on the mind of the subject.

Our critique of the objections to and defenses of torture is guided by this model of distant stimuli being used to create midbrain and cortical suffering and of the long-term effects of overload. If the long-

51. See *Brewer v. Williams*, 430 U.S. 387 (1977).

52. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL NO. 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 5-75 (2006) [hereinafter HICO MANUAL], available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf> (listing acts that are prohibited during interrogation).

53. See, e.g., PETERS, *supra* note 3, at 171-74.

54. See generally M. Vorbrüggen & H.U. Baer, *Humiliation: The Lasting Effect of Torture*, 172 MIL. MED. 29 (Supp. I 2007).

55. See *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) 25, para. 104, 167 (1978); JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 4-8 (2000) (noting that the “five techniques” included wall standing, hooding, noise bombardment, sleep deprivation, and food and water deprivation; and that the men subjected to these techniques suffered from extensive psychological after-effects such as panic attacks, nightmares, and so on).

56. *Ireland*, 2 Eur. Ct. H.R. at para. 167.

57. CONROY, *supra* note 55, at 8.

58. KANDEL, *supra* note 41, at 481.

59. *Id.* at 346-47.

term effects of psychological coercion and cruel, inhuman, or degrading conduct are as bad as or worse than purely physical torture, the distinction between torture and cruel, inhumane, or degrading treatment is much less logical than may initially appear. Likewise, if the sequelae of *psychological* coercion are more crippling to what makes a person human and a society just, the distinction becomes little more than a balm for the conscience. And if the harms involved include the captors as well as the captives, the calculus of coercive interrogation could shift significantly in the direction of an absolute ban rather than controlled use.

In addition, these studies cast doubt on whether physical pain of the sort envisioned by the Convention's limitations is of much value as an intelligence-gathering tool. The CIA concluded that the use of direct, physical pain breeds resistance; thus, pain must instead be inflicted by the subject upon himself (as in prolonged stress positions).⁶⁰ Accordingly, the techniques forbidden by the Convention on Torture are only likely to be employed by unsophisticated agents.⁶¹

60. See CIA, *supra* note 4, at 94. The KUBARK Manual explains that [w]hen the individual is told to stand at attention for long periods, an intervening factor is introduced. The immediate source of pain is not the interrogator but the victim himself. The motivational strength of the individual is likely to exhaust itself in this internal encounter As long as the subject remains standing, he is attributing to his captor the power to do something worse to him, but there is actually no showdown of the ability of the interrogator to do so.

. . . .
 [However,] [i]ntense pain is quite likely to produce false confessions, concocted as a means of escaping from distress. A time-consuming delay results, while investigation is conducted and the admissions are proven untrue. During this respite the interrogatee can pull himself together. He may even use the time to think up new, more complex "admissions" that take still longer to disprove.

Id. at 94 (internal quotation marks omitted) (first alteration in original). The recurring theme is repeated here as well: physical pain is merely a crude tool for creating psychological pain. The Manual goes on to point out that

[t]he threat of coercion usually weakens or destroys resistance more effectively than coercion itself. The threat to inflict pain, for example, can trigger fears more damaging than the immediate sensation of pain. In fact, most people underestimate their capacity to withstand pain. The same principle holds for other fears: sustained long enough, a strong fear of anything vague or unknown induces regression, whereas the materialization of the fear, the infliction of some form of punishment, is likely to come as a relief.

Id. at 90-91.

61. This is not to say that pain doesn't work at all. As an Army interrogator recently noted, "If coercion doesn't work, why would the agency go to the trouble?" CHRIS MACKAY & GREG MILLER, *THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL*

Focusing on the physical methods involved in coercion ignores the fundamental goal of coercive interrogation,⁶² which is the creation of unbearable psychological pressure from which the subject may escape only through compliance.⁶³ A more theoretically and biologically accurate notion of interrogation recognizes that the pain of torture or cruel, inhuman, or degrading conduct is simply a crude way of reaching and recruiting the subject's higher cognitive functions.⁶⁴ It also points to a central question for policymakers as technology and

QAEDA 477 (2004). Of course, the simple, brutal techniques that are still likely to be used in places like Africa and the Middle East are problematic for those concerned with human rights; however, we are concerned here with the United States and the Western powers.

62. CIA, *supra* note 4, at 83 ("All coercive techniques are designed to induce regression.").

63. Many techniques that depend on building rapport eventually employ the exact same method—love of family, hate of comrades, futility, and so on. See generally MATTHEW ALEXANDER & JOHN BRUNING, *HOW TO BREAK A TERRORIST: THE U.S. INTERROGATORS WHO USED BRAINS, NOT BRUTALITY, TO TAKE DOWN THE DEADLIEST MAN IN IRAQ* (2008). Is it simply a question of what pressures are permissible? The KUBARK Manual continues:

[T]he result of external pressures of sufficient intensity is the loss of those defenses most recently acquired by civilized man: the capacity to carry out the highest creative activities, to meet new, challenging, and complex situations, to deal with trying interpersonal relations, and to cope with repeated frustrations. Relatively small degrees of homeostatic derangement, fatigue, pain, sleep loss, or anxiety may impair these functions. As a result, most people who are exposed to coercive procedures will talk and usually reveal some information that they might not have revealed otherwise.

....

... [T]he response to coercion typically contains at least three important elements: debility, dependency, and dread. Prisoners have reduced viability, are helplessly dependent on their captors for the satisfaction of their many basic needs, and experience the emotional and motivational reactions of intense fear and anxiety. Among the American POW's pressured by the Chinese Communists, the DDD syndrome in its full-blown form constituted a state of discomfort that was well-nigh intolerable.

CIA, *supra* note 4, at 83–84 (internal quotation marks omitted) (original alterations omitted).

64. In a sense, then, coercive interrogation and warfare are fundamentally akin: they are both ways to force an opponent to do something against his will. See BEVIN ALEXANDER, *HOW WARS ARE WON: THE THIRTEEN RULES OF WAR FROM ANCIENT GREECE TO THE WAR ON TERROR* 9 (2003). This kinship gives rise to a simple defense of torture which contends that, since one can kill the enemy during war, and since torture is less grave of a harm than killing because the subject can go on enjoying at least some of the good things in human life after torture, then one must be able to torture an enemy during war. But if the problem with torture is its effect on the torturer, this defense loses whatever viability it may have.

neurophysiology advance: namely, if other, more subtle ways were found to commandeer a subject's will, would they be objectionable under the current understanding of torture and cruel, inhuman, and degrading conduct?

For instance, experimentation and diagnostic imaging have given medical researchers extensive insights into the particular areas of the brain that generate and regulate aggression, pleasure, memory, fear, speech, despair, and so on.⁶⁵ In addition, doctors have made advances toward treating severe depression by directly applying a microvolt current to a specific area associated with the thalamus.⁶⁶ Other studies have suggested that transcranial ultrasonic stimulation could produce comparable effects without invasive surgery.⁶⁷ Likewise, pharmacological researchers have long sought chemical means to offset the effects of conditions like prolonged sleep deprivation and chronic pain.⁶⁸ Could the knowledge gained in these studies be used to generate fatigue, pain, terror, or despair in normal detainees to facilitate interrogation? We can see no insurmountable obstacle to using these or similar techniques to produce the same cognitive states sought by psychological coercion, while (the practicalities of surgery aside) the people using them could claim to have clean hands. "After all," they could say, "all we did was strap the prisoner in a chair in front of a pair of metal coils for a few hours. He never even saw them, and we didn't put a scratch on him—just eight hours of sleep and three meals a day, which is more than we get!"

Regarding the philosophical implications of this notion of coercion, one well-known but particularly noteworthy perspective on torture concluded that physical pain cannot break a man; rather, a man must break himself. The late Vice Admiral James Stockdale was shot down over Vietnam and became a high-ranking officer in the darkest Vietnamese POW camps during his seven-year-long incarceration.⁶⁹ He endured—and commanded others who endured—genuinely hor-

65. KANDEL, *supra* note 41, at 365-66.

66. See, e.g., Helen S. Mayberg et al., *Deep Brain Stimulation for Treatment-Resistant Depression*, NEURON, Mar. 3 2005, at 651-60.

67. See, e.g., David H. Avery et al., *Transcranial Magnetic Stimulation in the Acute Treatment of Major Depressive Disorder: Clinical Response in an Open-label Extension Trial*, 69 J. CLINICAL PSYCHIATRY 441 (2008).

68. See, e.g., Francisco Paulino Dubiela et al., *Inverse Benzodiazepine Agonist β -CCM Does Not Reverse Learning Deficit Induced by Sleep Deprivation*, 469 NEUROSCIENCE LETTERS 169 (2010).

69. STUART I. ROCHESTER & FREDERICK T. KILEY, *HONOR BOUND: AMERICAN PRISONERS OF WAR IN SOUTHEAST ASIA, 1961-1973*, at 145 (1999).

rific conditions, including regular torture.⁷⁰ Two of his many insights are particularly relevant to our discussion. First, he discovered in the “laboratory of human behavior” that fear and guilt—i.e., the loss of moral certainty after reaching the limits of physical endurance and cracking⁷¹—are what break the will, not physical pain:

It’s hard to discuss in public the real-life challenges of that laboratory because people ask all the wrong questions: How was the food? That’s always the first one, and in a place like I’ve been, that’s so far down the scale you want to cry. Did they harm you physically? What was the nature of the *device* they used to harm you? Always the device or the truth serum or the electric shock treatment—all of which would totally defeat the purpose of a person seriously trying to break down your will. All those things would give *you* a feeling of moral superiority, which is the last thing he would want to have happen. I’m not talking about brainwashing; there is no such thing. I’m talking about having looked over the brink and seen the bottom of the pit and realized that truth of the linchpin of Stoic thought: that the thing that brings a man down is not *pain* but *shame!*⁷²

Admiral Stockdale’s insight coincides with a penetrating objection to the evils of torture. Professor Seidman noted that the true evil in torture is that it strips away the thing that makes us most human:

The problem with torture is not just that the victim’s will is commandeered but that it is commandeered by the dehumanizing realization that all that we associate with being human is an illusion. Threats to the body uniquely carry this consequence because they alone lead us to forsake the version of ourselves that is not simply a corporeal machine. It follows that although torture’s detractors are right to focus on pain, many of them are mistaken about the role that pain plays. It is not the pain itself that is the essence of torture’s evil. It is rather what the pain produces—the terrible betrayal of our self-understanding of human life.⁷³

Consequently, Seidman suggests, torture uncovers the abyss beneath the veil of society, exposing our professions of morality and humanity as no more than pleasant fictions:

Torture’s truth, then, is that all of our promises to ourselves and to others are ultimately contingent. In related, albeit distinguishable, ways, torture shows us a truth about ourselves as individuals and as a

70. *Id.* at 146–48, 151, 161.

71. JAMES BOND STOCKDALE, *COURAGE UNDER FIRE: TESTING EPICETUS’S DOCTRINES IN A LABORATORY OF HUMAN BEHAVIOR* 14 (1993), available at http://media.hoover.org/documents/978-0-8179-3692-1_1.pdf.

72. *Id.* at 18–19.

73. Seidman, *supra* note 9, at 907.

society. In the most direct and literal sense, torture teaches us as individuals that we are slaves to our bodies and that our beliefs, our values, and our moral obligations—in short, all that makes us human—count for nothing when our bodies are at stake. And while this is true literally about the human body, it is also true metaphorically about the body politic. When it comes to it, we as human beings will do whatever it takes to stop the pain, just as we as societies will do whatever it takes to preserve our corporate identity.⁷⁴

Quoting a famous member of the French Resistance who was tortured by the Gestapo, Seidman suggests that shame and the loss of trust are the true harms involved in torture, not pain or the loss of autonomy: “Whoever has succumbed to torture can no longer feel at home in the world. The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully, will not be regained.”⁷⁵

However, another of Admiral Stockdale’s insights is particularly relevant here. Following the Stoics, Stockdale said that “there can be no such thing as being the victim of another. You can only be a victim of *yourself*.”⁷⁶ Accordingly, a Stoic would regard a person who places his “trust” in the world—or anything else outside his will—as fundamentally misguided: “Whoever then would be free, let him wish nothing, let him decline nothing, which depends on others; else he must necessarily be a slave.”⁷⁷ The Stoic’s radical revaluation of the notion of *harm* permitted Marcus Aurelius to write to himself after the death of three newborn children that one should not pray against losing one’s child, but against *fearing* such a loss.⁷⁸ This proper notion of harm (and its concomitant notion of good as only that which contributes to justice and good character) places one beyond the reach of the guilt and fear necessary for torture to subvert the will—assuming, of course, that the interrogation techniques employed cannot permanently drive the subject into psychosis and utterly circumvent his

74. *Id.* at 886.

75. *Id.* at 906 (quoting Jean Améry, *Torture*, in *ART FROM THE ASHES: A HOLOCAUST ANTHOLOGY* 121, 136 (Lawrence L. Langer ed., Sidney Rosenfeld & Stella Rosenfeld trans., 1995)).

76. STOCKDALE, *supra* note 71, at 5.

77. EPICETUS, *Enchiridion*, in *THE MORAL DISCOURSES OF EPICETUS* 255, 259 (Elizabeth Carter trans., 2007); *see also* STOCKDALE, *supra* note 71, at 10 (discussing this admonition).

78. *See* MARCUS AURELIUS, *MEDITATIONS* 156 (Jeremy Collier trans., Alice Zimmern rev. 1896).

rational faculties.⁷⁹ However, the Stoic answer to Seidman's notion of torture's truth is so impressive in part because it seems so difficult to attain. Limiting oneself to things truly within one's control is profoundly liberating, but it is nevertheless a radical departure from the common understanding of good and evil as pleasant and painful. Accordingly, the Stoic answer to torture is a vital insight. But Seidman's notion of revealing the abyss must also be a practical consideration, as it will probably be the operative understanding for many of those who experience coercive interrogation—whether as subjects, interrogators, commanders, colleagues, or simply as part of the society which employs it, defensively or otherwise.

Returning again to the contemporary debate, we suggest that whatever criticisms may be leveled at the Bush administration during the years following 9/11,⁸⁰ its conclusions about al-Qaeda as “unlawful combatants” were logical.⁸¹ The Geneva Conventions were designed to ensure that the great nations of the world would never again fight an all-out war. Ideally, a nation that abstains from using the more ruthless options available during combat can expect reciprocation from its enemies, limiting (as much as possible) the unnecessary harms inflicted on soldiers and noncombatants. But the Conventions specifically require, among other things, that the parties march openly as uniformed soldiers, so belligerents captured while engaged in espionage cannot claim the protections offered to prisoners of war.⁸² The

79. This, of course, is the point of sensory deprivation. The CIA appears to have thought that a combination of sodium pentothal and hypnosis was effective as well. See ALFRED MCCOY, *A QUESTION OF TORTURE* 27 (2006).

80. See, e.g., JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 329 (Anchor 2009) (2008) (arguing that Abu Ghraib was the result of irresponsible leadership rather than a few bad apples).

81. Press Release, President George W. Bush, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/print/20011113-27.html>.

82. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(2), 1125 U.N.T.S. 3 (stating that only lawful combatants may participate in hostilities); *id.* art. 51(3) (stating that civilians lose their protections if they participate in combat); Geneva Convention Relative to the Treatment of Prisoners of War art. 4(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (stating that lawful combatants are members of armed forces, militia, or resistance groups that wear fixed and distinctive emblems that are recognizable from a distance, that openly carry their arms, that follow an established chain-of-command, and that conduct all operations in accordance with the laws and customs of war).

need for this requirement is obvious to any first-year contracts student. How could a party maintain its benefit of the bargain—the expectation of reciprocal abstention from advantageous but uncivilized gains—if the other could seek out those gains in secret?

Sub-national belligerents such as al-Qaeda present a comparable situation. In game theory terms, nations sign the Conventions because it is a signal of their type—non-torturers, non-users of biological and chemical weapons, and so on—a signal they know other nations will recognize. Signatories hope that when other nations consider this signal in light of an expectation of repeated future interactions and the high “transaction costs” of warfare outside the Conventions, each will eschew the cost of preparing, using, and defending against forbidden weapons and means and methods of warfare, and the world as a whole will benefit from the “efficiency gains” of life without the darker possibilities of modern warfare.⁸³ However, there is no possibility of reasonable certainty of reciprocation from sub-national organizations that lack an enforceable chain of command. This is especially true for organizations like al-Qaeda, which operate by hiding in independent cells among the noncombatants that the Conventions were designed to protect and which lack the formal command structure present in Vietnam.⁸⁴

83. If we carry the game theory analogy a bit further, however, we note that each signatory must be willing to breach—and signal that they are willing to breach—in order to maintain a credible threat to enforce compliance from the other “players.”

84. Jefferson Reynolds has explained the Viet Cong’s strategies as follows: Vietnamese leadership described the Vietnam conflict as a “people’s revolution,” requiring the incorporation of the entire Vietnamese population into its defense. The strategy to incorporate the populace into the conflict increased the difficulty in distinguishing between civilian and military objects, and promoted collateral damage. The Vietcong commonly took advantage of objects normally legally immune from attack to conduct military operations and to obtain sanctuary for military personnel, equipment and supplies. Such objects included religious and historical buildings, private dwellings or other civilian structures. In some cases, the U.S. restricted targeting protected objects used as sanctuary. For example, dikes on the Red River being used as platforms for air defense were restricted from attack. Notwithstanding Vietcong transgressions in commingling military personnel and resources with the civilian population, their ability to leverage public sympathy from U.S. bombing campaigns and incidents of collateral damage was novel and well planned. The Vietcong ultimately achieved a strategic advantage that contributed to efforts to discredit U.S. operations and force a withdrawal from the conflict.

Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 19–20 (2005) (citations omitted). Though lacking a strict central com-

Terrorist organizations, which can only or will only fight by exploiting the norms underlying the Geneva Conventions and the customary laws of war, are *hostis humani generi* akin to pirates,⁸⁵ and therefore it is unprincipled as well as irrational to treat them just like signatories. Consequently, any coherent objection to using coercive interrogation against enemies like al-Qaeda must be based on a prudential or principled consideration of the effect of such conduct on the *nation employing it* rather than legal or ethical arguments about the status or rights of the captive.

In our view, it is prudent to avoid coercive methods like this because they will diminish the fighting spirit of our armed forces by undermining our belief that our cause is just. The Chinese general Sun Tzu claimed around 500 B.C. that he could predict victory or defeat by measuring the qualities of the opposing armies.⁸⁶ Foremost among these qualities was the *Tao*, the “Moral Law,” which “causes the people to be in complete accord with their ruler, so that they will follow him regardless of their lives, undismayed by any danger.”⁸⁷ This notion is not merely a relic of ancient beliefs; for example, Mao Tse-tung, leader of the “People’s Liberation Army” during the civil war against the Kuomintang government under Chiang Kai-shek (arguably the most effective guerilla campaign in history),⁸⁸ successfully adopted it during the Chinese alliance against the Japanese Empire.⁸⁹

mand, al-Qaeda nevertheless operates from a basic core of beliefs based on the Quran and various schools of interpretive “sayings” about the Prophet (*hadith*)—e.g., that the duty to engage in jihad is an individual obligation (*fard ‘ayn*) of every faithful Muslim when infidels invade Muslim lands. See Osama bin Ladin, *World Islamic Front Statement Urging Jihad Against Jews and Crusaders*, in *AL-QAEDA IN ITS OWN WORDS* 53, 54-55 (Gilles Kepel & Jean-Pierre Milelli eds., 2008). And like the Vietcong, al-Qaeda skillfully uses channels of mass communication to generate outrage, both within its own sphere of influence and in the West. See Omar Saghi, *Osama bin Ladin, the Iconic Orator*, in *AL-QAEDA IN ITS OWN WORDS*, *supra*, at 11, 39.

85. See Douglas R. Burgess, *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT’L & COMP. L. REV. 293 (2006).

86. SUN TZU, *supra* note 28, at 2.

87. *Id.* at 1.

88. See ALEXANDER, *supra* note 64, at 28-31 (detailing how Mao’s cultivation of the Chinese peasants’ support and dissipation of the Kuomintang forces permitted the technologically inferior Red Army to constantly hold the initiative and select favorable engagements, resulting in the establishment of a regime that still exists today in the world’s most populous nation).

89. See MAO TSE-TUNG, *ON GUERRILLA WARFARE* 63-71 (Samuel B. Griffith II trans., 2000) (1961). Mao gave the following moralistic prediction:

The Japanese are waging a barbaric war along uncivilized lines. For that reason, Japanese of all classes oppose the policies of their government, as do vast international groups. On the other hand, because China’s cause is right-

Principles are important to soldiers, who need to believe in the justice of their actions to have an effective fighting spirit, especially in the often unpredictable battle against asymmetric foes.⁹⁰ Likewise, Admiral Stockdale noted that in Vietnam the ability to resist the despair of captivity and the Vietnamese attempts at indoctrination depended in part on the soldier's conviction that he had the moral

eous, our countrymen of all classes and parties are united to oppose the invader; we have sympathy in many foreign countries, including even Japan itself. This is perhaps the most important reason why Japan will lose and China will win.

Id. at 69-70. In fact, Mao ruthlessly tortured political rivals and their families. See, e.g., PHILIP SHORT, MAO: A LIFE 272-74 (2001) (describing interrogations and forced confessions at the "Hall of Sincerity and Respect"). However, in spite of reality, Mao was a skillful manipulator of the perception of the moral high ground; for instance, when fighting Chaing Kai-shek, Mao portrayed a year-long, eight thousand-mile retreat as proof of moral and military superiority of the Red Army:

[T]he Long March is the first of its kind in the annals of history, that it is a manifesto, a propaganda force, a seeding-machine. . . . [H]as history ever witnessed a long march such as ours? For twelve months we were under daily reconnaissance and bombing from the skies by scores of planes, while on land we were encircled and pursued, obstructed and intercepted by a huge force of several hundred thousand men, and we encountered untold difficulties and dangers on the way; yet by using our two legs we swept across a distance of more than twenty thousand li The Long March is a manifesto. It has proclaimed to the world that the Red Army is an army of heroes, while the imperialists and their running dogs, Chiang Kai-shek and his like, are impotent. It has proclaimed their utter failure to encircle, pursue, obstruct and intercept us. The Long March is also a propaganda force. It has announced to some 200 million people in eleven provinces that the road of the Red Army is their only road to liberation. Without the Long March, how could the broad masses have learned so quickly about the existence of the great truth which the Red Army embodies? The Long March is also a seeding-machine. In the eleven provinces it has sown many seeds which will sprout, leaf, blossom, and bear fruit, and will yield a harvest in the future. In a word, the Long March has ended with victory for us and defeat for the enemy.

Mao Tse-tung, *On Tactics Against Japanese Imperialism*, in 2 COLONIALISM: AN INTERNATIONAL, SOCIAL, CULTURAL, AND POLITICAL ENCYCLOPEDIA 1058, 1062 (Melvin E. Page et al. eds., 2003). Of course, this fundamental disconnect between reality and perception probably led to the corrupt, myopic regime that eventually starved millions of Chinese, goaded its youth to ruthlessly crush the traditions of one of the world's oldest cultures, and held back the modernization of China for nearly half a century. See DANIEL CHIROT, MODERN TYRANTS: THE POWER AND PREVALENCE OF EVIL IN OUR AGE 195-99, 205-06 (1996).

90. See CHRISTOPHER COKER, THE WARRIOR ETHOS: MILITARY CULTURE AND THE WAR ON TERROR 133-35, 139-40 (2007).

high ground.⁹¹ On the other hand, statements by Jane Fonda, Stokely Carmichael, and Ramsey Clark “at once incensed and demoralized” the POWs.⁹² Principles are also important to the democratic nations that supply men and funding to wage war (whether or not they acknowledge it): since democracies dislike protracted conflict and have different wellsprings of fighting spirit than nationalistic, ideological, or fanatical regimes, their fighting spirit must be carefully conserved.⁹³ Accordingly, we suggest that the routinization of torture would have a corrosive effect on our warfighters’ morale and our country’s belief that the United States occupies the moral high ground in its ongoing fight with al-Qaeda and jihadist extremism. Thus, no matter what actionable intelligence could be obtained from torture, the effect on our moral certainty and fighting spirit would constitute a defeat on the broader battlefield that encompasses our and the world’s perception of the West as a civilization dedicated to higher principles than our enemies.

Of course, these very objections were put forward by the Judge Advocates General.⁹⁴ During the drafting of the Working Group Report, Major General Jack Rives contended that,

[s]hould any information regarding the use of the more extreme interrogation techniques become public, it is likely to be exaggerated/distorted in both the U.S. and international media. This could have a negative impact on international, and perhaps even domestic, support for the war on terrorism. Moreover, it could have a negative impact on public perception of the U.S. military in general.

. . . [T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral “high-road” in the conduct of our military operations regardless of how others may operate. Our forces are trained in this legal and moral mindset beginning the day they enter active duty. It should be noted that law of armed conflict and code of conduct training have been mandated by Congress and emphasized since the Viet Nam conflict when our POWs were subjected to torture by their captors. We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal

91. ROCHESTER & KILEY, *supra* note 69, at 180.

92. *Id.*

93. See 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 344-45 (Francis Bowen ed., Henry Reeve trans., 3d ed. 1863) (contrasting the superiority of reasoned discipline in democratic armies with the blind obedience of aristocratic ones).

94. See generally Lederman, *supra* note 11 (summarizing the numerous JAG memoranda).

sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.⁹⁵

Brigadier General Kevin Sandkuhler concurred, pointing out the deleterious effect coercive interrogation could have on the armed forces:

When assessing whether to use exceptional interrogation techniques, consideration should be given to the possible adverse effects on U.S. Armed Forces culture and self-image which suffered during the Vietnam conflict and at other times due to perceived law of war violations. DOD policy indoctrinated in the DOD Law of War Program in 1979 . . . greatly restored the culture and self-image of U.S. Armed Forces by establishing high benchmarks of compliance with the principles and spirit of the law of war and humane treatment of all persons in U.S. Armed Forces custody.⁹⁶

Professor Luban raised a similar objection about implementing coercive interrogation in the civilian sphere: any organized body creates its own expansive network of aides, subcontractors, and instructors who become more or less instrumental to the business at hand.⁹⁷ However, Professor Peters provides the most eloquent explanation of what we regard as the fundamental problem with torture and coercive interrogation, whether physical or psychological:

Societies that do not recognize the dignity of the human person, or who profess to recognize it and fail to do so in practice, or recognize it

95. Memorandum from Jack L. Rives, Deputy Judge Advocate Gen., U.S. Air Force, to Working Group (Feb. 5, 2003).

96. Memorandum from Kevin M. Sandkuhler, Staff Judge Advocate, U.S. Marine Corps, to Gen. Counsel, U.S. Air Force (Feb. 27, 2003).

97. See Luban, *supra* note 16, at 1446. Luban writes:

Should universities create an undergraduate course in torture? Or should the subject be offered only in police and military academies? Do we want federal grants for research to devise new and better techniques? Patents issued on high-tech torture devices? Companies competing to manufacture them? Trade conventions in Las Vegas? Should there be a medical sub-specialty of torture doctors, who ensure that captives do not die before they talk? The questions amount to this: Do we really want to create a torture culture and the kind of people who inhabit it? The ticking time bomb distracts us from the real issue, which is not about emergencies, but about the normalization of torture.

Id. (footnotes omitted). Indeed, it is frightening to contemplate the apparatus that already existed to produce the data from which the KUBARK Manual was written. See, e.g., McCoy, *supra* note 79, at 44-46 (detailing a CIA project in which unwitting patients seeking psychological treatment were subjected to drug-induced comas, electroshock, and extended periods of sensory deprivation inside a football helmet playing looped statements such as "Your mother hates you," resulting in profound and long-lasting trauma).

only in highly selective circumstances, become, not simply societies with torture, but societies in which the presence of torture transforms human dignity itself, and therefore all individuals and social life. And a society which voluntarily or indifferently includes among its members both victims and torturers ultimately leaves no conceptual or practical room for anyone who insists upon being neither.⁹⁸

III. A MORE FUNDAMENTAL VIEW OF TORTURE

In our view, the overall strategy of counterinsurgency, our country's moral certainty, and our warfighters' *esprit de corps* deserve more emphasis in the debate about torture and coercive interrogation because their absence can permit certain dangerous scenarios, while their inclusion can guide policymakers toward a safer, more successful, and more effective use of interrogation. Of course, several objections leap to mind, not least of which is that this is simply a slippery slope argument.⁹⁹ Though the slippery slope argument is commonly considered a logical fallacy, Professor Eugene Volokh has noted that it is fallacious only insofar as it mistakenly assumes that there is no principled stopping point between what is in question and the terrible fate that allegedly awaits.¹⁰⁰ Here, the force that pushes back against the use of torture is the moral outrage of the public against the brutality involved—and, as explained above, moral outrage against torture can be trumped by other outrages, such as that generated by suicide attacks.¹⁰¹

History suggests that torture is not a safe tool for anyone at any time. Even under a system of rigid hierarchy where torture was controlled by explicit laws, it crept outward from its original bounds as each new crime became terrible enough to warrant torture.¹⁰² “Pre-

98. PETERS, *supra* note 3, at 187.

99. Posner & Vermeule, *supra* note 35, at 688.

100. Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARVARD L. REV. 1026, 1029 (2003).

101. See, e.g., Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION, *supra* note 8, at 291, 293-94.

102. See, e.g., PETERS, *supra* note 3, at 25-26, 28-29. Under the Romans, torture was originally used only for slaves in criminal cases or those convicted of *crimen laesae maiestatis* (the crime lessening majesty, of the emperor or of Rome itself); however, eventually slaves could be tortured for evidence in certain civil cases, and *humiliores* (free plebians) could be tortured if they were publicly dishonored or of “low condition.” *Id.* at 30. “The infamous person, like the slave of old, lacks the *dignitas* to offer voluntary testimony merely under questioning; torture must validate his testimony.” *Id.* at 31. But the privilege against torture was also eroded downward between the second and fourth centuries—traitors (defined by the expansive whim of the emperor)

cise, limited, and highly regulated in law and legal theory, torture became quickly roughened in the hard world of applied law among the hardened personnel of the court system.”¹⁰³ Professors Posner and Vermeule argued against this position:

The problem with this argument is . . . [that] it is pure speculation, belied by our experiences with other measures. Take capital punishment. One could argue that killing convicted criminals is just as likely to brutalize society as torturing them. Yet the trend has been in the opposite direction. Historically, nations have cut back on capital punishment rather than expanding it; this has been driven by revulsion against its use against minor criminals

The argument recalls the various “ratchet” theories, which hold that the adoption of new law enforcement measures that restrict civil liberties inevitably become entrenched, and thus the starting point when new emergencies generate pressure for aggressive law enforcement, so that there is always a downward pressure on civil liberties. These theories have never been adequately defended. In the context of torture, there have been many examples of western countries adopting coercive interrogation and similar aggressive practices as temporary measures to deal with a particular emergency—France in Algeria, Britain against the IRA—and then abandoning them when the emergency is over. Israel uses coercive interrogation against suspected terrorists; this practice has not spread to other settings, as far as we know. Far from desensitizing the public to violence and pain, the use of coercive interrogation and similar measures can inspire revulsion, and a renewal of a commitment not to use them except in extreme circumstances.¹⁰⁴

However, the situation may not be as simple as claimed. The corrosive effects of torture on a society’s mores and the armed forces’ fighting spirit could be immediate, but they could also take longer to fully develop. The growth of torture in Rome and under Romano-Canonical law took generations to expand outward to arbitrary or universal use,¹⁰⁵ while the movement from considering “monsterring” as an extreme to a baseline measure at Bagram occurred over the course of a few years.¹⁰⁶ Similarly, who can say what harm the revelations of

as well as female poisoners, diviners and sorcerers, adulterers and those with unnatural lust, and Christians could all be tortured for evidence and/or punishment, regardless of station. Likewise, under Romano-Canonical law, what was originally reserved for the lowest classes expanded via the doctrine of *infamia* and the *crimen exceptum* until the fifteenth century, when anyone could be tortured. *Id.* at 61.

103. *Id.* at 69.

104. Posner & Vermeule, *supra* note 35, at 689-90 (footnotes omitted).

105. See PETERS, *supra* note 3, at 55.

106. MACKEY & MILLER, *supra* note 61, at 405.

misconduct in Vietnam have ultimately done to the fighting spirit of the American people and its armed forces?¹⁰⁷ Furthermore, it is not clear whether the West has actually abandoned the techniques developed in Algiers, Northern Ireland, or Gaza, or how we will know when the problems associated with organizations like al-Qaeda have ended, or if they ever will.¹⁰⁸ And regarding revulsion, a sufficiently outraged public could simply become comfortable with coercive interrogation that resembles torture (i.e., become brutalized) rather than outraged by it. Likewise, would a society gradually sliding downward into corruption notice that decline?¹⁰⁹

107. See Lederman, *supra* note 11 (providing documentation demonstrating that General Sandkuhler pointed to the extensive DOD efforts to repair the image of the U.S. armed forces after Vietnam).

108. ROCHESTER & KILEY, *supra* note 69, at 180 (noting that the listing of countries employing temporary measures to deal with a particular emergency does not include Israel).

109. Consider Professor Peters' insight into modern torture:

Language that identifies torture with *inhuman* practices also presupposes an anthropology, one shaped in the late eighteenth century out of old and new principles of European thought. That anthropology has survived, barely, it sometimes seems, into the late twentieth century, but there is no guarantee that it will necessarily survive forever. It survived in part because it was embodied in jurisprudence, governmental policies and institutions, and international agreements, as well as in the literature of moral philosophy, in the arts, and in a high and low cultural consensus, indeed, in sentiment as well as law and morality. It may be possible to make torture disappear by making it effectively illegal and dangerous to those who practice it, but it seems necessary also to preserve the reason for making it illegal and dangerous—to preserve a notion of human dignity that, although not always meticulously observed, is generally assumed All human beings are assumed by this anthropology to possess a quality called human dignity. As Immanuel Kant once observed, punishments or other forms of treatment may be considered inhuman when they become inconsistent with human dignity. It is important to distinguish this operative idea of human dignity from what Malise Ruthven has acutely called the “threshold of outrage”—a fluctuating notion of appropriate treatment of individuals depending on social status, background, or class. The idea of human dignity must not be distracted by momentary thresholds of outrage or momentary designations of sentiment. It is sometimes easier to erode a large idea like that of human dignity slowly from its distant edges rather than to risk the abrupt introduction of torture outright in a society. It is easier to transform an anthropology slowly, for with such a transformation, torture may appear as a logical and predictable step.

PETERS, *supra* note 3, at 185–86.

Consider, for instance, the growth in recent years of so-called “torture porn.”¹¹⁰ If the ratchet effect is gradual enough, could each new torque give rise to a moderate level of outrage that the next generation finds palatable? Could torture become palatable as coercive interrogation becomes more distant and less gory, as its objects appear less human, and as the dangers of eschewing it become graver and more horrifyingly presented on television dramas and twenty-four hour cable news? And could the problems involved in dealing with regions of the world marked by popular adherence to tyrannical regimes that thrive on nationalism, xenophobia, and resentment ultimately lead us into using the quick solution of coercion at the cost of losing our grip on the principles and institutions that distinguish our way of life from theirs?¹¹¹

Assuming that this understanding of torture is valid, what effect should it have on the current guidelines for interrogation? First, all interrogators should focus on the use of “rapport-building” techniques outlined in the Army’s field manual on collecting human intelligence,¹¹² which are also commonly employed by criminal investigators and the FBI.¹¹³ These techniques (such as playing on detainee’s love of family) often proved more effective than “fear and control” techniques during the hunt for Zarqawi.¹¹⁴ In fact, several detainees (including a member of the Shura Council) revealed details about al-Qaeda operatives, safe houses, weapons, suicide bombs, and supply lines in Iraq—however, none would give up their superiors out of fear of what al-

110. David Edelstein, *Now Playing at Your Local Multiplex: Torture Porn*, NEW YORK, Jan. 28, 2006, <http://nymag.com/movies/features/15622> (“I’m baffled by how far this new stuff goes—and by why America seems so nuts these days about torture.”).

111. Compare CHIROT, *supra* note 89, at 410–12, 417 (analyzing the development of tyrannical regimes in Germany, Russia, Cambodia, Argentina, and elsewhere, and arguing that modern tyranny frequently results from the combination of unstable regimes, national rage, and the desire to cleanse society from foreign corruption), with Osama bin Laden, *Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Sanctuaries*, in AL-QAEDA IN ITS OWN WORDS, *supra* note 84, at 47, 47–50 (reciting a history of Western oppression of Muslims and exhorting them to take up arms against the corrupt crusaders).

112. HICO MANUAL, *supra* note 52, at 8-3. Note that interrogators in Department of Defense agencies are limited to the techniques approved in this Field Manual. *See id.* at 8-1 (“The only authorized interrogation approaches and techniques are those authorized by and listed in this manual, in accordance with the Detainee Treatment Act of 2005.”); COUNTERINSURGENCY MANUAL, *supra* note 28, at D-5 (“The Detainee Treatment Act established [the HICO Manual] as the legal standard. No techniques other than those prescribed by the field manual are authorized by U.S. forces.”).

113. *See, e.g.*, ALEXANDER & BRUNING, *supra* note 63, at 22, 36.

114. *Id.* at 5.

Qaeda would do to them and their families.¹¹⁵ Nevertheless, rapport-building eventually persuaded a key detainee to give up al-Rahman, who drove a particular car whenever he went to see Zarqawi.¹¹⁶ U.S. special forces followed the car, bombed its destination, and found Zarqawi dying in the rubble.¹¹⁷

Of course, one difficult problem with the exclusive use of rapport-building is that coercive interrogation (including waterboarding) was only debated because high-ranking al-Qaeda captives began stonewalling their interrogators.¹¹⁸ Likewise, one interrogator noted that a tough detainee who had been through United States detention before knew that he would not be harmed, and knew that the evidence against him was not tight enough to support conviction and execution under Iraqi law—so he simply refused to talk.¹¹⁹ Faithful detainees would also refuse to talk when they lapsed into a state of silent resignation to the will of Allah,¹²⁰ a state that in some ways resembles the stiff resistance among American POWs noted by Admiral Stockdale.¹²¹ In fact, our military discovered an al-Qaeda training manual for operatives taken prisoner by the United States.¹²² It revealed every technique the detainees had been employing—stonewalling, vagueness, use of *cunyas* (false names) and the Islamic calendar—and included an entire section on the West.¹²³ As one interrogator noted, the manual

115. See *id.* at 59, 117, 215-17. This fear was probably justified; the author claims that his colleagues had witnessed videos of al-Qaeda operatives using power drills to punish Iraqis who had given information to U.S. forces. *Id.* at 43.

116. *Id.* at 275.

117. *Id.* at 278-79.

118. See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., to John Rizzo, Acting Gen. Counsel, CIA 1 (Aug. 1, 2002), available at <http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques/page/1>.

119. ALEXANDER & BRUNING, *supra* note 63, at 177.

120. MACKAY & MILLER, *supra* note 61, at 286.

121. See STOCKDALE, *supra* note 76, at 15. Of course, everyone has a breaking point, and each man eventually said more than name, rank, and serial number during his years of captivity. *Id.* Nevertheless, the savvy POWs often turned forced confessions or admissions to their own advantage, such as by lacing statements with double meanings and claiming that the only two American pilots to resign in protest over Vietnam were Clark Kent and Ben Davies. *Id.* at 16.

122. MACKAY & MILLER, *supra* note 61, at 178.

123. *Id.* at 178-79. The al-Qaeda manual was exhaustive and probably written by jihadists who had experience with detention in various countries:

Hold out on providing any information for at least twenty-four hours, it said, to give “brothers” enough time to adjust their plans. The Americans “will not harm you physically,” the manual said, but “they must be tempted into doing so. And if they do strike a brother, you must complain to the

accurately detailed the way to exploit the American dedication to human rights.¹²⁴

Even if we are correct that the armed forces should use (and signal that they will only use) interrogation techniques similar to those employed by criminal investigators,¹²⁵ the problem of stonewalling seems to leave only two alternatives: be content with silence and wait out the detainee if possible, or hand the detainee over to someone else for whom the moral high ground is not a critical consideration. Accordingly, the only alternatives to waiting out a detainee appear to be (1) giving non-military intelligence-gathering agencies the authority to carry out coercive questioning (without publicly specifying exactly what they may do to preserve an aura of fear), or (2) rendering high-

authorities immediately.” It added that the baiting of Americans should be sufficient to result in an attack that leaves “evidence.” You could end the career of an interrogator, maybe even prompt an international outcry, if you could show the Red Cross a bruise or a scar. America’s aversion to torture was presented as a symbol of American weakness. The West didn’t have the stomach for such things, the book said, “because they are not warriors.” Throughout, the tone was condescending. “Brothers, they will not understand our reasons [for fighting], and you must contrive to exploit their ignorance.”

Other sections were dedicated to resisting other Middle Eastern interrogators’ methods. These were clearly regarded as more formidable than Western approaches. Egypt, Jordan, Morocco—practically every country had a paragraph describing ways of obtaining information, often in language that seemed to indicate the author had firsthand experience. Included were hand-drawn pictures about positions “brothers can expect” to be placed in: sitting on the ground with their hands tied to their ankles; kneeling with a stick behind their knees, cutting off circulation to the legs; hanging from their arms tied behind their backs. One picture was like a Michelangelo drawing of the body, with each part labeled with a description of another horror. Gouge out eyes. Cut out tongue. It talked about filleting people, skinning their arms with knives. Dropping cement blocks on knees. Drilling kneecaps. Ripping fingernails off. Pouring boiling water on a prisoner’s skin. There was even a picture of Chinese water torture, with a funnel releasing a series of drips on a prisoner’s head

Id. at 179–80.

124. *See id.* at 180 (noting that the “most infuriating thing” about the terrorists’ training manual was how accurately it described their American captors’ limitations, which permitted al-Qaeda to lie, refuse to talk, or change their stories with impunity).

125. This proposal is underway, although centering the program within the boundaries of the United States may unnecessarily hamper field interrogators who are making significant progress with recently captured detainees. *See* Anne E. Kornblut, *New Unit to Question Key Terror Suspects*, WASH. POST, Aug. 24, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/23/AR2009082302598.html>.

value detainees to countries that detainees believe will use coercive methods.

The first option is objectionable because there is not enough “acoustic separation” to allow the agencies like the CIA to use forbidden techniques without similarly undermining the nation’s moral certitude. An interrogator stated a very succinct and adequate objection to allowing any U.S. agency to use techniques that resemble torture: “The reason the United States should not torture prisoners is not because it doesn’t work. It is simply because it is wrong. It dehumanizes us, undermines our cause, and, over the long term, breeds more enemies . . . than coercive interrogation methods will ever allow us to capture.”¹²⁶

Any prolonged military campaign necessarily involves harm to the local civilian population, and U.S. forces are trained to carefully weigh the risks to noncombatants against the success of the mission at hand and to use proportional rather than indiscriminate force in carrying out operations.¹²⁷ Counterinsurgency, an ethically and politically complex operation,¹²⁸ requires that U.S. forces carefully consider their operations in light of the insurgency’s strategy, a key part of which is demoralizing the counterinsurgency and eroding its political will by portraying it as illegitimate and unethical even by its own standards.¹²⁹ Likewise, an insurgency necessarily seeks the sympathy of international bodies and relies on the civilian population for supply, intelligence, and mobility.¹³⁰ Mao Tse-tung secured the support of the Chinese peasants by seizing land and claiming he was distributing it to the oppressed workers as recompense for years of bourgeois abuse,¹³¹ which became a model for Communist revolutionaries in Latin America.¹³² The Viet Cong tried to capitalize on the other side of the coin—hiding within local population centers to force the U.S. Marines either to withhold or to direct the damage from their superior firepower towards the local population and fuel resentment against the foreign invader, which would increase Viet Cong recruitment and pop-

126. MACKEY & MILLER, *supra* note 61, at 477.

127. *See, e.g.*, COUNTERINSURGENCY MANUAL, *supra* note 28, at 7-5, 7-7.

128. *Id.* at 7-5.

129. *Id.*

130. *See, e.g.*, ERNESTO GUEVARA, GUERRILLA WARFARE: A METHOD 183 (1985) (“[G]uerrilla warfare is a people’s war; to attempt to carry out this type of war without the people’s support is the prelude to inevitable disaster.”).

131. *See* SHORT, *supra* note 89, at 177-78, 436-37.

132. *See* GUEVARA, *supra* note 130, at 51.

ular support.¹³³ Likewise, the insurgents in Algiers gained local and international support when the French policy of interrogational torture by elite paratroopers became known to the native Algerians and to the world.¹³⁴

To pin down and strangle an insurgency, it must be separated from its supply and shelter (i.e., from the popular support of the people),¹³⁵ and to secure a nation plagued with insurgency, the civilian population must regard the counterinsurgent force as beneficial, strong, and morally superior.¹³⁶ This will necessarily shift more risk to the counterinsurgency's warfighters, which is an unavoidable part of the "burden of command."¹³⁷ However, applying force without discriminating between the civilian population and the insurgents—including during coercive interrogations, which necessarily involve spillover because they take place when certainty is scarce¹³⁸—erodes support for the government supported by the counterinsurgency and pushes uncommitted actors to the insurgency's side.¹³⁹ Accordingly, permitting non-military intelligence agencies like the CIA or their contractors to conduct coercive interrogations, even in order to obtain vital intelligence, undermines our goals in Iraq and Afghanistan and weakens the armed forces' long-term attack on the strategy underlying jihadist extremism.¹⁴⁰

On the other hand, the implicit threat of rendition to a Gulf state worked well during interrogations in Afghanistan. In one instance, a

133. MARK MOYAR, PHOENIX AND THE BIRDS OF PREY: COUNTERINSURGENCY AND COUNTERTERRORISM IN VIETNAM 285-86 (2007). Contrary to many popular media accounts, U.S. forces did not use indiscriminate force against Vietnamese hamlets, which is why the Viet Cong chose them as hiding places. *Id.* at 286-87.

134. See PETERS, *supra* note 3, at 133-35. The revelations actually led to the end of the Fourth Republic and the creation of the Fifth. *Id.* at 133.

135. COUNTERINSURGENCY MANUAL, *supra* note 28, at 1-23.

136. See, e.g., *id.* at 1-27, 5-14, 5-21 to -22; see also MOYAR, *supra* note 133, at 301-06 (detailing the decrease in support for the Viet Cong among rural Vietnamese in the 1960s and 1970s due to improvements in the leadership and oversight of South Vietnamese units and several crushing defeats of the Viet Cong forces).

137. COUNTERINSURGENCY MANUAL, *supra* note 28, at 7-3.

138. See HENRY SHUE, *Torture*, in TORTURE: A COLLECTION, *supra* note 8, at 47, 54-55 (noting that, whether or not the subject of coercive interrogation is an enemy or neutral and whether or not the subject has disclosed all he knows, he is likely to answer the same way).

139. See COUNTERINSURGENCY MANUAL, *supra* note 28, at 1-24. Consider, for instance, what effect the Abu Ghraib photos must have on Iraqi support for the Coalition government.

140. See *id.* at A-8 (distinguishing fighting insurgents, which is often not productive, from fighting the insurgency's strategy).

pair of skilled Army interrogators used the permissible threat of returning a detainee to his native Algeria (where he believed he and his family would be executed for aiding suicide bombers, a capital offense) to learn two vital facts: (1) that, under pressure from the West during 2001, the ruling council under Mullah Omar decided to force out all terrorist groups and training camps in Afghanistan except for al-Qaeda, and consequently bin Laden offered all the various factions' leaders a deal to fly al-Qaeda flags and support al-Qaeda's aims in order to stay; and (2) one of the assignments given pursuant to this agreement was to poison the U.S. Embassy in Rome.¹⁴¹ This information led to the arrest of eight Moroccans who had eight pounds of potassium ferrocyanide, a city map with the Rome Embassy circled, and underground utility maps.¹⁴² Later, interrogators prepared an elaborate ruse, planting rumors that stoked the detainees' fears of being sent to a Middle Eastern prison (whose reputation for cruelty and torture was known throughout the Arab world), preparing manacles and darkened goggles, and asking detainees to help translate words like *extradite* and *remand*.¹⁴³ They recruited a confederate to pose as a Gulf state colonel who walked through the cells with an interrogator placing strips of duct tape on the detainees, writing "transport" or "remain" on each of them in Arabic.¹⁴⁴ Shortly thereafter, there was an epidemic of mysteriously ill detainees who wanted to clarify their original stories and rat out others, many of whom then followed them into the booth expecting that the first wave of sick had given away secrets to avoid the Gulf-bound plane.¹⁴⁵

Still, the legality of rendition is fundamentally questionable, since the United States' obligations under the Convention Against Torture require that it "refuse extraditions and deportations where there is a credible threat of torture or other human right violations of the person to be removed."¹⁴⁶ While rapport-building must be the primary tool for armed forces interrogators, it is probably insufficient, standing alone, to gather all possible intelligence on terrorist organizations and their plans. Rendition, however, is probably an inadequate solution since it runs afoul of our international obligations and may undermine

141. MACKEY & MILLER, *supra* note 61, at 171-73.

142. *Id.*

143. *Id.* at 354-63.

144. *Id.* at 360.

145. *Id.* at 361-63.

146. Eric C. Bales, *Torturing the Rome Statute: The Attempt to Bring Guantanamo's Detainees within the Jurisdiction of the International Criminal Court*, 16 TULSA J. COMP. & INT'L L. 173, 189 n.132 (2009) (citing United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 25).

our cause just as much as performing coercive interrogations ourselves. Likewise, although the threat of rendition has worked, it is not a serious solution because the terrorists would soon learn that U.S. policy was to make threats but not act on them. For the present, the threat of rendition works because sometimes it actually happens. But if the Third World and the people of the Middle East were to regard the destination state as a puppet of imperialist Westerners,¹⁴⁷ we would face the same problems with blowback we would have encountered if we simply interrogated the detainees ourselves. More importantly, letting foreign states do the dirty work of coercive interrogation could actually be worse than doing it ourselves if we become complicit in the uncontrolled use of the darkest of the methods noted above.¹⁴⁸

CONCLUSION

Although some of the legal world's brightest lights have debated torture and coercive interrogation, many objections are inadequate insofar as they fail to address the deeper problems. The overemphasis on brutality could lead policymakers to permit coercive methods that are more subtle and less likely to evoke disgust in the public. However, less innately horrifying methods can still undermine the humanity of the subject, the user, and the society which employs them—in fact, such weapons may actually be *more* dangerous precisely because they are less overtly harmful to their wielder. Thus, the debate should focus less on the brutality of methods and more on the fundamental nature of coercion.

Accordingly, we propose a biologically accurate distinction between permissible and impermissible coercion that rests on two factors: the source of pressure and the mode of inhibiting the subject's self-control. Any technique which relies on dehumanizing sources of pressure (e.g., forcing a mother to watch her child being tortured) or modes of overcoming resistance (e.g., starvation) must be avoided. This approach permits policymakers to weigh potential techniques without being misled by a novel mechanism for overriding the subject's will, such as direct neurological stimulation or new and potent pharmaceuticals. At the same time, this approach provides clearer support for the distinction between forbidden methods and permissible techniques like the "Christian burial speech" or exploiting one's love of family, which rely on pressures that do not debase the subject

147. See, e.g., Osama bin Laden, *Message to the American People*, in AL-QAEDA IN ITS OWN WORDS, *supra* note 84, at 71, 73.

148. See sources cited *supra* note 123.

or the interrogator and are therefore compatible with waging a just war.

Waging a just war requires careful adherence to standards that avoid dehumanizing our enemies or ourselves. And while we join Admiral Stockdale in rejecting the view held by Seidman that torture uncovers an abyss beneath human society or exposes the rootlessness of human life, Seidman's conclusion is understandable given the unimaginable trauma of suffering torture. Thus, the implications of Professor Seidman's conclusions for interrogators, prisoners, the armed forces, and the people of the United States must be considered in the calculus of obtaining actionable intelligence while holding the moral high ground.

Ultimately, then, we suggest that maintaining our awareness of the distinction between ourselves and the enemies we fight is the key to holding the moral high ground. Many justifications for torture and coercive interrogation are inadequate because they fail to address this problem. Regardless of a detainee's status, the duration of the harm a particular technique inflicts, or the value of the information gathered through coercive interrogations, such policies erode our warfighters' awareness that our cause is just and worth fighting for. In addition to diminishing the armed forces' effectiveness, torture erodes the public support necessary to win a long engagement by betraying our beliefs, tarnishing our self-image, and falsifying our promises to host countries and the rest of the world. Whatever tactical and logistical flexibility will be necessary to fight jihadist extremism in this age of asymmetric warfare, the worst defeat may well be to use our enemies' weapons against them at the cost of undermining the principles that we hope to inculcate in their culture and to preserve in ours.