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2008

# Torture and the Professions

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Crim. Just. Ethics, Summer/Fall 2007, at 2, 58-65

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# GEORGETOWN LAW

## Faculty Publications



July 2008

### Torture and the Professions

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## COMMENTARY

## Torture and the Professions

DAVID LUBAN

Last year, Cambridge University Press published a book titled *The Torture Debate In America*.<sup>1</sup> In my opinion, it's a shocking title. Ten years ago, a puzzled reader would have asked "What torture debate in America? There's no torture debate!" After all, torture is a serious federal crime. U.S. courts had denounced the "dastardly and totally inhuman" practice of torture,<sup>2</sup> and the U.S. government condemns torture in the benighted countries that practice it.

As they say: There was before 9/11 and after 9/11. Now, we take it for granted that there is a torture debate in America.

Indeed, I would like to suggest that there are two torture debates in America. One, waged in the popular press and in TV melodramas like *24*, is an entirely fictitious debate about whether you should torture terrorists to find the ticking time bomb. This debate is fictitious, because it assumes, or stipulates, a wildly improbable set of facts: that we know there is a ticking time bomb, that we know the time is short, that we know we have the right person, that we know he knows where the bomb is, that we know he won't talk under humane interrogation, and that we have good reason to believe that he will talk under torture, rather than lying or holding out until the bomb goes off—or passing out or dying. We also know that the torturer is not a sadist or a brute, and that this case is an exception to an anti-torture

rule that the interrogator, who is no sadist or psychopath, basically accepts. All these assumptions are, of course, deeply questionable.<sup>3</sup>

Unfortunately, everyone who talks about torture talks about ticking bombs, as if once we've settled our moral intuitions in this singular case, we've settled everything there is to settle. In fact, the ticking bomb scenario settles almost nothing, because it has almost nothing to do with reality. The case is, quite simply, an intellectual fraud.

Last November, General Patrick Finnegan, the dean of West Point, flew to Los Angeles together with two experienced interrogators, to plead with *24*'s script-writers to get rid of all those scenes where the American hero, Jack Bauer, stops the ticking bomb by torturing the terrorist. Not only did General Finnegan protest that these scenes falsify reality—where the tough stuff tends to fail and rapport-building succeeds—he also complained that the show's popularity among soldiers in Iraq and Afghanistan has created a monstrous "life imitates art" problem: the soldiers are ignoring their own training in order to become torturers like Jack Bauer.

The meeting was a failure. Understandably, the writers don't want to abandon the formula of their highly successful show. And Joel Surnow, *24*'s executive producer and a self-described "right-wing nut job" with connections to high Bush administration officials, refused to attend the meeting.<sup>4</sup>

General Finnegan's fear is that the phony debate about ticking time bombs will erode military discipline and contribute to a torture culture within the U.S. military. That problem should be

the real focus of the torture debate. It is not about rare exceptions and existential choices made by heroic secret agents flying solo. It is about practices, attitudes, and protocols regarding how to interrogate detainees who may know something of interest or may not—and who may be the right person or may not. And, I might add, who may give more and better information under humane interrogation than they will through brutality and humiliation.

An additional worry is that a torture culture—bad enough on its own terms—inevitably escalates and overflows its boundaries. Abu Ghraib is the most famous American example, but it is by no means the only one. We also have cases like the death of Manadel Jami, roughed up by Navy SEALs and the CIA, then hung by his arms behind his back until he died; and Iraqi General Abed Hamed Mowhoush, smothered to death in a sleeping bag by an over-zealous interrogator who said he was trying to induce claustrophobia; and two young Afghans, Dilawar and Habibullah, killed under torture by U.S. servicemen five years ago in a Bagram prison; and Abdul Wali, an Afghan farmer beaten to death with a flashlight by contract interrogator David Passaro. These are by no means the only cases, but they are the best-known, and I single them out because nobody in the U.S. government denies they took place.

To talk about practices and protocols of torture is to talk about a professional culture of torture. That culture requires the help of doctors, lawyers, and psy-

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chologists; and that is why, today, I want to talk about torture and the professions. However, the law frames the debate about interrogation methods, and before going any further, I need to sketch out the legal background and the dramatic story that follows from it.

Two pieces of law are particularly relevant. The first is a world-wide treaty, the Convention Against Torture, approved by 140 member states. It defines torture as the intentional infliction of severe physical or mental pain or suffering, and it requires states to criminalize torture. The U.S. has belonged to the Torture Convention for twenty years, and in line with the treaty, Congress made torture a serious federal felony that can carry the death penalty.

The Torture Convention also requires states to "undertake to prevent" cruel, inhuman, and degrading treatment that falls short of torture—so-called CID.<sup>5</sup> Unlike torture, the treaty does not require parties to make CID a crime, only to undertake to prevent it; and it isn't a crime under U.S. law. It is illegal, though: in 2005, over strong Bush administration objections, Congress passed the McCain Amendment, which bans the government from using CID anywhere in the world.

So, the first distinction to remember: torture is a crime; CID is not a crime, but it is illegal.

The second important piece of the legal framework is the Geneva Conventions, which forbid not only torture and cruel treatment, but also "outrages against personal dignity" including humiliating and degrading treatment.<sup>6</sup> Geneva is a treaty, and under our Constitution, treaties are "supreme law of the land." The United States ratified Geneva in 1955, and in the mid-1990s Congress passed a war crimes statute that made all grave Geneva violations serious federal crimes.<sup>7</sup>

Probably everyone reading this essay knows that in early 2002 President Bush declared that the Geneva Conventions don't apply to Al Qaeda or Taliban captives. However, the *Hamdan* decision (2006) by the Supreme Court reversed the administration on this issue, and

found that basic Geneva protections apply to captives of both groups.<sup>8</sup> That meant that U.S. interrogation practices, which heavily featured humiliating and degrading treatment, were now officially war crimes—not just under international law, but under U.S. criminal law as well.

The *Hamdan* decision threw U.S. government lawyers into a frenzied effort to formulate a legislative response. The crucial moment came at the end of the summer of 2006. In a dramatic press conference, President Bush confirmed that the CIA had secret prisons in foreign countries. He also confirmed that some detainees had been interrogated using what he delicately called "an alternative set of procedures." The president would not say what the alternative procedures were, but he described them as "tough, safe, [and] lawful. . . ." A week later, in a press conference, he posed a question in the starkest terms: "Do you want the program to go forward or not?"<sup>10</sup>

The program. What is "the program"? What are these "tough, safe, lawful" alternative procedures?

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### *The Hamdan decision threw U.S. government lawyers into a frenzied effort to formulate a legislative response.*

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The previous November, persons within the CIA who leaked information had given us part of the answer.<sup>11</sup> They detailed six techniques used on high-value Al Qaeda detainees. Let me mention the three most drastic: Cold Cell, Long Time Standing, and Waterboarding.

In Cold Cell, the detainee is stripped naked, placed in a cell at fifty degrees, and kept wet. Long Time Standing means forcing the detainee to stand for up to forty hours, chained to an eyebolt in the floor. And Waterboarding is a method of inducing the panic-sensation of drowning by tying the detainee down, placing cellophane or a wet cloth over his nose and mouth, and pouring water over it. It's an old idea, called

the "ducking stool" when it was used against accused witches at Salem, and "El Submarino" by secret police in Latin American dirty wars.

Furthermore, we know about "the program" from the U.S. Army's own report about other cruel and humiliating tactics used at Guantánamo Bay, many in the interrogation of Mohammed Al Qahtani. These included 160 days of isolation. They included intensive sleep deprivation—18- to 20-hour daily interrogations for 48 out of 54 days, interrupted only when Qahtani's heart-rate plunged catastrophically.<sup>12</sup> They included humiliation tactics, including four that migrated to Iraq and reappeared in the horrifying Abu Ghraib photographs: threatening him with growling, barking dogs; placing women's underwear on his head to humiliate him; stripping him naked in front of U.S. women; and leading him around on a dog leash and making him do dog tricks. Qahtani was also shot up with intravenous solution and made to urinate on himself.<sup>13</sup>

Other tactics that the Army report admits included bombarding detainees with high-volume rock and rap music—what the Army called "futility music"—and threatening to have one detainee's mother arrested and shipped to Guantánamo.

There were other sexual humiliations as well: dressing Qahtani in a bra, taunting him as a homosexual, and having a female interrogator straddle him while she described the deaths of fellow Al Qaeda members. FBI agents also described surreal scenes in which Arab prisoners were strapped in chairs and forced to watch gay porn while strobe lights flashed in their faces.<sup>14</sup>

That is "the program."

Following the press conference, after weeks of pressure from the White House, Congress passed the Military Commissions Act (MCA) of 2006. The act gave the president what he wants. Remember that *Hamdan* made it clear that humiliation tactics are war crimes under U.S. law. The MCA responded in the most direct possible way: it decriminalized them, retroactively, all the way back to 1997. They are still illegal, but they are no longer crimes, and indeed there is no sanction for violating them.

Torture, remember, means intentionally inflicting severe physical or mental pain or suffering. These are common-sense descriptive terms, not arcane lawyer's words; and common sense says that some of the techniques I've described are plain torture. Consider the tactic of Long Time Standing. Decades ago, Cornell University researchers studied Long Time Standing because it was a tactic that the KGB used. They found that standing for eighteen hours or more makes fluid move down into the ankles. The ankles double in size. Excruciating joint pain sets in. Blisters erupt and ooze watery serum. Heartbeats race, as the heart tries to keep blood pumping up to the brain. Kidneys fail; and victims begin to experience delusions.<sup>15</sup>

Waterboarding, too, is torture. CIA agents who subjected themselves to it broke after fifteen seconds, and interrogators were reportedly filled with admiration at Al Qaeda leader Khalid Sheikh Mohammed for lasting more than two minutes.<sup>16</sup> If you want to know how Waterboarding feels, try blowing all the air out of your lungs and then holding your breath for two minutes. (Just—please!—don't do it now.)

Other techniques obviously *aren't* torture. Presumably it is not torture to be dressed in a bra. But there is little doubt that the many forms of sexual humiliation that U.S. forces inflict on detainees—and I've described only the best-documented of them—count as “humiliating and degrading treatment,” “outrages on personal dignity.” Even if these are no longer crimes, they remain illegal. More fundamentally, they are immoral. Jack Bauer doesn't do them, presumably because, unlike physical violence, they might upset a television audience. But they are part of “the program.”

All of this serves by way of background to my main topic today—the role of the professions in the nasty little torture culture constructed at Guantánamo, at Camp Cropper and Camp Bucca, at Abu Ghraib, and at secret CIA prisons like “Hotel California,” so named because you can check in but you can't check out again. I'm going to discuss three professional examples, lawyers, psychologists, and anthropologists, and

mention a fourth, physicians—before turning to more general ethical questions about professionals dancing with the devil.

### Lawyers

The most famous examples are the lawyers. A few weeks after the Abu Ghraib revelations in 2004, the *Wall Street Journal* published a secret “torture memo” written by Justice Department lawyers in 2002. It was soon followed by literally thousands of pages of documents, some leaked, some public, that made it clear that the road to Abu Ghraib had been paved with legal opinions. Carefully and methodically, the torture lawyers disconnected the brakes on harsh interrogations.

The famous torture memo provided maximum impunity for interrogators. It concluded that inflicting physical pain doesn't count as torture unless the interrogator specifically intended the pain to reach the level associated with organ failure or death; that inflicting mental suffering is lawful unless the interrogator intends it to last for months or years after the interrogation; that enforcing criminal laws against torturers is unconstitutional if the president authorizes the torture; that lawful self-defense includes torturing helpless detainees in the name of national self-defense; and that torture can be justified as the lesser evil through the legal defense of necessity.

The memo's legal arguments were widely regarded as preposterous. It defined torture by lifting language from a Medicare statute on medical emergencies. It ignored inconvenient Supreme Court precedents, flatly misrepresented what sources said, and at one point argued that while torture might be justified as a lesser evil, the same needn't be true of life-saving abortions.

Eventually the Justice Department withdrew the torture memo and replaced it with a more presentable one. In my view, though, the changes were merely cosmetic—and, in fact, the substitute memo states in a footnote that all tactics approved under the previous memo are still approved.<sup>17</sup> Furthermore, in October 2007 the *New York Times* reported that as late as 2005 the Justice Department produced two new torture

memos—one to approve “the harshest interrogation tactics ever used by the CIA,” the other to approve cruel, inhuman, and degrading treatment.<sup>18</sup>

It would take too much time to go through all the important torture opinions written by government lawyers. But I do want to mention one other, because it figures importantly in my next case-study, the psychologists. This is an opinion from April 2005 interpreting the legal meaning of CID—cruel, inhuman, and degrading treatment that falls short of torture. Unlike the torture memo, it is not well-known. It appears in a letter from the Justice Department to three senators who had questioned U.S. interrogation policy; and it was meant to flesh out testimony from Alberto Gonzales at his confirmation hearing. It was signed by Assistant Attorney General William E. Moschella, and I'll call it the “Moschella opinion.”<sup>19</sup> The Moschella opinion correctly points out that when the U.S. ratified the Torture Convention, the Senate attached an understanding saying that the term “CID” means the kind of cruel treatment forbidden by the U.S. Constitution. This, in the Supreme Court's famous formula for unconstitutional cruelty, is treatment that “shocks the conscience.”<sup>20</sup>

According to the Moschella opinion, this category includes “‘only the most egregious conduct,’ such as ‘conduct intended to injure *in some way unjustifiable by any government interest.*’”<sup>21</sup> Of course, if this were really the test, then no form of abuse or mistreatment would shock the conscience if it is intended to help national security. On the Moschella test, nothing in “the program” could ever shock the conscience, and therefore nothing in the program could ever count as CID treatment banned by the Torture Convention and the McCain Amendment.

Can that be right? The answer is emphatically no. To be sure, the “unjustifiable by any government interest” language that Moschella quoted comes directly from a Supreme Court opinion. But—characteristically of the torture memos—the Moschella opinion cleverly leaves off the rest of the sentence to distort its meaning. The full sentence in the Supreme Court's opinion says that



injurious conduct unjustifiable by any government interest “is the sort of conduct *most likely* to rise to the conscience-shocking level.”<sup>22</sup> That seems true—but of course, it in no way suggests that other conduct doesn’t equally shock the conscience.

In fact, the Court held exactly the opposite of what the Moschella opinion says in *Rochin*, the case that first introduced the “shocks the conscience” formula into U.S. jurisprudence. In that decision, the Court found that it unconstitutionally shocks the conscience for police to pump a suspect’s stomach to retrieve narcotics evidence, even though retrieving evidence obviously *is* a justifiable government interest. The Moschella opinion conveniently fails to mention this decision, just as it conveniently cuts off the Supreme Court’s statement halfway through to change its meaning.

I’ve argued in several places that writing legal opinions like these is unethical.<sup>23</sup> They are what lawyers call “Cover Your Ass” (CYA) opinions, designed to reassure clients that the lawyers have exonerated in advance whatever they might do. In this respect, they are no different from opinion letters that large law firms write for corporate clients like Enron, saying that their financial shenanigans are proper and legitimating them in advance.

Of course, in their role as advocates lawyers are always supposed to argue the construction of the law most favorable to what the client wants, relying on the adversary to argue differently. What makes CYA opinions unethical by professional standards is that lawyers advising clients don’t have an adversary and are not supposed to be advocates. Their duty, under the profession’s ethics codes, is to provide clients with “independent” and “candid” advice about what the law requires, not advice spun to say whatever the clients want to hear.<sup>24</sup> Lawyers who write “Cover Your Ass” memos are neither independent nor candid. They are not advocates or advisors, but rather indulgence sellers.

Indulgence-selling is not a role that the profession recognizes, and it is not a role that the profession *ought* to recognize. The legal advisor is supposed to be a check on client illegality, not a facilita-

tor of it. The ABA’s Model Rules justify confidentiality by postulating that when clients confidentially ask lawyers for legal opinions, lawyers usually try to dissuade their clients from wrongdoing. If what really goes on is that the client tells the lawyer, “Write me an opinion that says I can do what I want to do,” and the lawyer obliges, then the ABA’s argument collapses and confidentiality ought to be abolished.

Of course, there’s an even more basic reason for criticizing the torture lawyers. It’s one thing for lawyers to loophole the law on behalf of clients’ financial shenanigans or tax “avoision.” It’s quite another to loophole the law on behalf of cruel, inhuman, and degrading treatment. As Jeremy Waldron has powerfully argued, the content of laws matters: laws protecting basic human rights should be interpreted by looking at their spirit and purpose, not by kabbalistic formal manipulations of their letter to give the client wiggle-room for torture.<sup>25</sup>

When we turn from the Justice Department’s lawyers to the American Bar Association, however, matters are quite different. The ABA has produced a series of reports condemning the abuse of detainees and their lack of legal process. And, in a notable gesture, in the fall of 2007 the ABA’s president refused a government request to help locate pro bono lawyers to represent Guantánamo detainees, because the legal process available to detainees is too unfair for the ABA to support.<sup>26</sup>

### Psychiatrists and Psychologists

I turn next to the psychologists. Their role in the interrogation process is interesting and complex. For decades, the CIA has studied psychological manipulation as an interrogation tool. The military uses the science of psychology for similar purposes, but also to study how U.S. service personnel can be immunized against brainwashing if they are captured. This is the so-called “SERE” program—an abbreviation for Survival, Evasion, Resistance, Escape. A couple of years ago, *The New Yorker’s* Jane Mayer revealed that Guantánamo interrogators are accompanied by Behavioral Science Consultation Teams—the acronym is

“Biscuits.”<sup>27</sup> Biscuits try to reverse-engineer the SERE findings, coaching interrogators in how best to manipulate captives to break them.<sup>28</sup> Some of the SERE techniques are among the torture and CID techniques I described earlier, including Waterboarding.<sup>29</sup>

But even apart from torture techniques, the Biscuits determine what kind of deprivations will work with uncooperative detainees, and what kind of rewards will reinforce cooperative behavior. “According to a former interrogator . . . , behavioral scientists control the most minute details of interrogations, to the point of decreeing, in the case of one detainee, that he would be given seven squares of toilet paper per day.”<sup>30</sup>

Arguably, there’s nothing unethical about psychologists offering general advice about how to manipulate detainees into talking. After all, manipulation is the humane alternative to torture and cruelty. (I note, however, that many psychologists disagree, because they believe that participating in any way at all in a setting like Guantánamo is unethical.)

The third-rail issue for Biscuits lies in determining when to use so-called Ego Down and Futility tactics—interrogators’ shorthand for attempts to humiliate detainees or drive them to despair, in order to get them to open up. Obviously, psychologists who devise Ego Down protocols are treading on the territory of “humiliating and degrading” treatment forbidden by the Geneva Conventions.

But I think troubling ethical problems can arise even from treatment that comes nowhere near CID or torture. I recently asked a U.S. interrogator who had worked in Iraq and Afghanistan about the Biscuits in his unit. His surprising answer was that a Biscuit taught him how to induce Stockholm Syndrome in detainees. It’s easy to do, he explained, and remarkably effective. Detainees have all the time in the world on their hands. Their only human contact is their interrogator, and—oddly enough—that makes the interrogation sessions the high point of the detainee’s day. To induce Stockholm Syndrome, the interrogator simply expresses a lot of interest in the detainee, chats him up, brings him small gifts, gives him news of the outside world—and asks ques-

tions. If the detainee answers the questions, the conversation continues. If the detainee won't answer questions, the interrogator simply leaves, and the high point of the day is gone for another day. In a remarkably short time, the detainee bonds with the interrogator the way a dog bonds with its master.

Clearly, this doesn't come within miles of cruel or humiliating treatment. It's just the opposite. Nevertheless, the interrogator who told me about it had deep misgivings about what he had done. In his words, "I had a moral problem about doing to him what the Symbionese Liberation Army did to Patty Hearst." To my astonishment, he brought up Dostoevsky's *Grand Inquisitor* and Arthur Koestler's *Darkness at Noon*—two texts that are remarkably to the point. This was, I might add, a young man in his early twenties, just out of the Army, beginning his freshman year in college. He is intelligent and thoughtful, and obviously he has read widely about his profession.

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*Seeming to take a principled position, it appears that the psychiatrists may have adopted a resolution with disabling loopholes.*

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In Stockholm Syndrome, kidnap victims identify emotionally with their captors and come over to the captors' values. When the captors are criminals, or political sects like the Symbionese Liberation Army, we can recognize how grotesque and pathological that is. But what if the prisoner is a suicide bomber and his captors' values are liberal-democratic? What if we think the captors' values are the right values? That has to count for something. But the fact that the prisoner acquires those values as a result of a pathology-inducing manipulation counts for something too. The young interrogator I spoke with decided that the balance favors the manipulation—and, on the whole, given the incredible violence in Iraq, I think he was right. But he also worried about the Grand Inquisitor, and that is right too.

I couldn't help but wonder whether the Biscuit thought about Dostoevsky and Koestler. I wonder whether the Biscuit thought at all about the morality of teaching interrogators how to induce psychopathology in prisoners. And I wonder whether the Biscuit would have greater qualms recommending sexual humiliations and torture.

In May 2006, the American Psychiatric Association adopted a resolution that forbids psychiatrists from participating in interrogations, either directly or indirectly,<sup>31</sup> and in June 2006 the American Medical Association reached the same conclusion for physicians.<sup>32</sup> There was debate among the psychiatrists about whether they could participate in non-coercive interrogations, but—according to Dr. Samuel Sharfstein, the American Psychiatric Association's president, in a letter to the *British Medical Journal*—a large majority thought that facilities like Guantánamo are "inherently coercive."<sup>33</sup> They rejected the Pentagon's argument "that doctors advising interrogators were 'behavioral scientists' exempt from 'ethics strictures.'"<sup>34</sup>

That is hardly the end of the matter, however. The resolution does permit psychiatrists to "provide training to military or civilian investigative or law enforcement personnel . . . on the possible medical or psychological effects of particular techniques and conditions of interrogation." That seems like a loophole in the resolution. Moreover, the view that Guantánamo is inherently coercive is not reflected in the text of the resolution itself; it is merely the reported view of most members of the Association. Furthermore, Dr. Sharfstein further diluted the message in an interview by "noting the position statement is not 'an ethical rule.'" He added that "individual psychiatrists wouldn't get in trouble with the APA" for failing to follow the guidelines, and, "If they're given an Army order, that would be another question."<sup>35</sup> As the philosopher J. L. Austin once wrote, there's the bit where you say it and the bit where you take it back. Seeming to take a principled position, it appears that the psychiatrists may have adopted a resolution with disabling loopholes.

Matters are even more controversial,

though, in the case of the American Psychological Association (APA), the leading professional association of psychologists, with 150,000 members. APA members have a "long involvement in military research and CIA behavioral experiments."<sup>36</sup> Over many years, tens of millions of government dollars have supported psychologists' research into interrogation methods, some of them profoundly threatening to sanity. For example, Jose Padilla, isolated in a military brig and interrogated for years before his criminal trial and conviction, now has the personality of—to quote the brig staff—a "piece of furniture."<sup>37</sup> The techniques of intense isolation that deranged Padilla come straight from the Kubark Manual, a notorious CIA summary of decades of psychological research.

Debate about whether the American Psychological Association should forbid psychologists from participating in interrogations arose after reports surfaced of mental health professionals assisting in breaking down detainees. The debate occurred in three phases. First, in 2005 the APA created a small Psychological Ethics and National Security (PENS) taskforce, which issued a report in June 2005.<sup>38</sup> Unlike the physicians' and psychiatrists' resolutions, this report did not propose forbidding psychologist participation in interrogations, so long as the interrogations are humane.

The report has subsequently proven controversial, because one member of the taskforce, Dr. Jean Maria Arrigo, has gone public with serious criticisms of its process—including the fact that six of nine voting members had Defense Department ties or were actually involved in Guantánamo interrogations. (In line with these process criticisms, my own colleague, Gregg Bloche—a lawyer-psychiatrist who has published high-profile exposés and critiques of medical involvement at Guantánamo—reports to me that he had been invited to meet with the PENS taskforce, but was disinvited at the last minute when the *New York Times* published an article about his forthcoming research.<sup>39</sup>)

The second phase of the controversy occurred at the Association's 2006 annual meeting. The Army's Surgeon-

General, Dr. Kevin Kiley, addressed the group and argued that “psychology is an important weapons system.” He pleaded with the APA’s governing council not to adopt any specific definition of abuse that psychologists are forbidden from participating in. He asked, “Is four hours of sleep deprivation [abuse]? How loud does a scream have to be? How many angels can dance on the head of a pin?” The APA’s leadership initially invited Kiley with no rebuttal speaker. In the face of a hasty petition drive by outraged members, a rebuttal speaker was invited at the last minute, with little time to prepare.<sup>40</sup> The Association then adopted a resolution about psychologists participating in torture or CID.<sup>41</sup>

None of this controversy is apparent from the APA’s resolution, which looks like a forceful condemnation of psychologists participating in torture or CID. In fact, its president, Sharon Brehm, wrote, “The American Psychological Association’s . . . position on torture is clear and unequivocal. Any direct or indirect participation in any act of torture or other forms of cruel, degrading or inhuman treatment by psychologists is strictly prohibited. No exceptions!”<sup>42</sup>

However, the APA’s position was *not* as clear and unequivocal as President Brehm believed. For one thing, the APA’s code of ethics permits members to obey lawful authority such as military orders even if doing so would violate the ethics code. Secondly, unlike psychiatrists and physicians, psychologists are permitted to participate in interrogations, so long as they don’t involve torture or CID.

Most importantly, though, at the last minute the APA added an innocuous-looking clause to its resolution about torture—a clause that builds the technical legal definition of CID into the resolution. This, remember, means that conduct only counts as CID if it is unconstitutional, that is, “shocks the conscience.” Remember as well that the Moschella opinion states that conduct with a legitimate governmental purpose, like national security, does not shock the conscience. I’ve pointed out that this badly misrepresents the law, but it is the executive branch’s own misrepresentation, and it provided a gaping legal loophole for any psychologist to participate in cruel or degrading interrogations.

Furthermore, the Moschella opinion eviscerates another protection that the APA built into its anti-torture resolution. The resolution commits members to respect the U.N.’s 1982 Principles of Medical Ethics relevant to the Role of Health Personnel, in the Protection of Prisoners and Detainees against Torture and CID. Among those principles is one forbidding health personnel from applying “their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees *and which is not in accordance with the relevant international instruments.*”<sup>43</sup>

On its face, it sounds good. But if the “relevant international instrument” is the Torture Convention’s ban on CID *as interpreted by the Moschella opinion*, this fine-sounding principle imposes no limit on what psychologists can do in devising cruel, inhuman, or degrading methods in the service of national security.

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Many APA members protested the 2006 resolution, and this led to the third phase of controversy: at its August 2007 convention, the organization adopted an even stronger resolution.<sup>44</sup> Here, again, a military psychologist argued passionately that the organization should permit psychologists to participate at Guantánamo, dramatically asserting that “If we lose psychologists from these facilities, people are going to die.” (This led the normally conservative *Houston Chronicle’s* editorial writers to protest that “any interrogation system that teeters so close to atrocities needs more than a psychologist.”<sup>45</sup>)

Nevertheless, the APA reaffirmed the 2006 resolution, but also strengthened it significantly. The new APA resolution lists almost twenty techniques—including

all those that U.S. forces have reportedly used—and specifies that they count as either torture or CID. That is something that the U.S. government has never admitted. And the resolution contains “an absolute prohibition against psychologists’ knowingly planning, designing, and assisting in the use of torture and any form of cruel, inhuman or degrading treatment or punishment.”<sup>46</sup>

Even here, however, the APA left loopholes. It once again uses the official definition of CID, which means that if the government devises harsh interrogation techniques other than those itemized in the resolution, the Moschella opinion implies that psychologists may participate in them. Furthermore, the resolution hedges on whether isolation, sensory deprivation or over-stimulation, and sleep deprivation count as CID—according to the resolution, they do only if “used in a manner that represents significant pain or suffering or in a manner that a reasonable person would judge to cause lasting harm,” which is in my view a significant loophole. The resolution affirms the right of psychologists to refuse to work in “settings in which detainees are deprived of adequate protection of their human rights,” but it imposes no duty on them to refuse to work in such settings.

The APA remains bitterly divided, with some high-profile resignations over the interrogation issue, and a decision by three college psychology departments to disown the resolution. Psychologist Ken Pope’s non-partisan and very valuable compilation of articles on the controversy now includes almost 150 items.<sup>47</sup>

The division among the psychologists partly reflects the gap between those who work for the Defense Department and those who do not; but it also reflects a long-standing difference in outlook between clinicians, who favor the Hippocratic, patient-centered, do-no-harm ethics of physicians and psychiatrists, and researchers, who by and large have a more neutral and technical outlook. By that I mean that the research enterprise focuses on acquisition of knowledge, and it carries no built-in assumptions about the purposes that knowledge can be enlisted to serve. If the researcher wants to study areas that advance hu-



man well-being, that is a fine thing. But if she wants to do research for its own sake, that is just fine too. And if she is hired by the CIA to help break down captives—that is entirely her prerogative. She may be interested in the interrogation problem as a pure technical challenge. Or she may think that placing her knowledge in service of the War on Terror is her patriotic duty. Her motive is irrelevant. Studying the human psyche is science, and in what I'm calling the technical view, it carries no built-in Hippocratic, health professional assumptions.

### Anthropologists

The same seems even clearer in the last profession I want to discuss, anthropology. Anthropologists are first and foremost social scientists, and the research enterprise doesn't dictate how their findings can be used. Because anthropologists study other cultures, anthropological knowledge can be very valuable to U.S. interrogators trying to pry information out of detainees from Afghanistan, Iraq, or Saudi Arabia.

Some of this seems benign. For example, interrogators will need to know the significance of kinship and clan relationships, culturally-specific gestures, and practices of courtesy in order to build rapport with captives and evaluate what they say and do.

But some of the knowledge can be put to more sinister purposes. Seymour Hersh reports that anthropologist Raphael Patai's book *The Arab Mind* was "the bible of neocons on Arab behavior."<sup>48</sup> It includes twenty-five pages on why Arab men find sexual humiliation and taunts about homosexuality peculiarly horrifying. Obviously, someone in the government put this knowledge to use and ordered sexual humiliation as an interrogation tactic.

I've said that anthropologists are, first and foremost, social scientists. That suggests that they may take the technical, rather than the Hippocratic, view of their profession. That's not how anthropologists see it, though. For decades, the profession has espoused a distinctive moral stance toward human cultures: a preference for tolerance, cultural preservation, and pluralist respect. Anthro-

pologists believe in culture as a source of value, perhaps the most important source of value. In 1947, the American Anthropological Association (AAA) issued a famous statement advocating a culturally-relativist conception of human rights.<sup>49</sup> (It drives moral philosophers nuts.) According to this view, the right to one's own culture is the most central human right.

In 1999, the organization modified this statement. It reiterated its commitment to respect for cultural differences, but now it argued that the organization's commitment could best be honored "in practical terms" through universal human rights, rather than cultural relativism.<sup>50</sup>

Given either understanding, it should come as no surprise that the idea of using anthropological knowledge to exploit the phobias of foreign cultures, as part of an us-versus-them military struggle to reconstruct their values, seemed to many anthropologists to be inconsistent with the very nature of their profession. In 1970, the profession had been roiled by charges and counter-charges about anthropologists participating in U.S. counter-insurgency operations in Southeast Asia. This was the so-called "Thailand controversy," which led to the resignation of several members of the AAA's ethics committee and the adoption of a professional code of ethics.<sup>51</sup>

So, in November 2006, the AAA business meeting adopted a resolution that "unequivocally condemns the use of anthropological knowledge as an element of physical and psychological torture," and went on to broadly condemn Bush administration detainee and interrogation policies.<sup>52</sup> The resolution passed in June 2007.<sup>53</sup> Furthermore, in October 2007 the AAA's Executive Board issued a statement condemning the military's so-called "Human Terrain System" project, which "places anthropologists, as contractors with the U.S. military, in settings of war, for the purpose of collecting cultural and social data for use by the U.S. military." Among other things, the Executive Board argues that in this project anthropologists may be "used to make decisions about identifying and selecting specific populations as targets of U.S. military operations either in the short or long term."<sup>54</sup>

Of course, there is a crucial difference between an anthropologist contracting with the government, and the government making its own use of published anthropological studies. Only the former raises issues of professional ethics. Furthermore, there is no denying that the resolution was deeply political—a way for a famously liberal professional organization to Bush-bash. But in this case, the political position also represents an attitude that most anthropologists regard as the basic norm of their profession.

### Professionalism and Torture

Those are my case studies: lawyers, psychiatrists and psychologists, and anthropologists. Let's step back now and ask what we can say about the general issue of professionals participating in "the program" of abusive interrogation. Remember that we are not talking about ticking time-bomb cases. We are talking about policies, protocols, and practices to use on any suspected high-value captive, to pump him for anything he might know that could conceivably help in the War on Terror.

First, as a legal matter, persons in each of these professions may have committed serious violations. Torture is a felony, and so is conspiracy to torture and complicity in torture. Humiliating and degrading treatment isn't a crime, because Congress retroactively decriminalized it at the last minute. But it remains illegal, because it violates the Geneva Conventions and the Detainee Treatment Act.

Not that any American prosecutor would touch these cases with a ten-foot pole. I mention the legalities only to put the issue in perspective. Participating in abusive interrogations not only offends against a moral norm that before 9/11 we found uncontroversial. It is also illegal, and in some cases criminal.

The ethical debates within the professions haven't been about legality, though. As we've seen, they are debates over whether the torture professionals have betrayed the core values of their professions. Here, I have some doubts.

Those who have said yes hold a particular view of the professions—the view that I've labeled "Hippocratic," in a broad sense that doesn't apply only to health professionals. It's a traditional

view of professionalism as inseparably combining two ingredients: mastery of a technical subject, and use of knowledge to serve broadly humane ends. In short: expertise plus service. In the case of lawyers, it also includes respect for the law.

For the past two decades, we've become familiar with this view of what a profession is in the endless debates over whether "commercialism" has been undermining "professionalism" in professions like law and medicine. Advocates of "professionalism" adhere to the Hippocratic vision of knowledge wedded to service 'til death do them part. They rail against those who see no vice in for-profit activities that don't necessarily honor the service ideal. These debates are often heartfelt, but it is fair to say that they have not made much progress. One reason, I think, is that those who hold the Hippocratic view seem to assume a dogmatic professional essentialism. They proclaim that combining expertise and service *just is* the core of the profession, and if you think otherwise you are not a real professional.

Now, as Arthur Applbaum has argued, there is a simple and fatal reply to professional essentialism. It goes something like this: You say that if I practice non-Hippocratic medicine I'm not a real doctor? Very well, then! Don't call me a doctor—call me a "shmactor"—what Applbaum calls "a different practice with different ends and different role obligations."<sup>55</sup> Doctor, shmactor. We shmactors know just as much about medicine as you doctors. But we declare that it's fine to put that knowledge to uses that you disapprove of—like assisting at interrogations.

In just the same way, if lawyers think it's a betrayal of professional ideals to tailor legal opinions to client desires, call them "shmawyers" and be done with it. Shmychologists have no qualms about teaching soldiers how to break detainees' will, and shmanthropologists are happy to sign contracts with the government to help devise counterinsurgency tactics.

Applbaum's point is that there is no essential core to what makes up a profession's ethos beyond the self-understanding and self-definition of the professionals at any given time.<sup>56</sup> If

enough doctors come to see themselves as shmactors—in other words, if they think that a shmactor *is* a doctor—then, as Applbaum says, "*it will become so.*"<sup>57</sup> Many people today believe that HMO practices like capitation have already turned doctors into shmactors, and large law firms that nakedly pursue partnership shares above all else have turned lawyers into shmawyers. The point of Applbaum's "doctor-shmactor" argument is simply to dramatize that there is no necessary connection between professional expertise and a Hippocratic vision of professional service.

For that reason, Applbaum rightly suggests that professionals have to fight for where they think their profession's soul lies. They won't find the answer by analyzing the concept of the profession. In my opinion, professionals should welcome vigorous debates like those undertaken by the organizations of physicians, psychiatrists, psychologists, and anthropologists. These are not merely culture-wars over symbolic issues. They are struggles for the soul of the professions.

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*Applbaum rightly suggests that professionals have to fight for where they think their profession's soul lies.*

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But matters can't be limited to an intraprofessional debate between doctors and shmactors, psychologists and shmychologists. The fact is that we lay-people also have understandings and expectations of how professionals should operate. Applbaum appreciates this when he writes that the physician's role "is stitched together from the shared social meanings of those who profess to be doctors *and those who call upon their services.*"<sup>58</sup> I would go even further than Applbaum. The larger public—those who are neither professionals nor directly use their specific services—also have a say in defining the professional role.

After all, the broader society awards substantial perks to professionals based

on our approbation of their roles. Some of these perks take the form of legal privileges. Because we think it is in people's interests to be able to consult a doctor or lawyer confidentially, we grant a valuable, enforceable attorney-client and doctor-patient privilege to these professionals. If we thought that lawyers were really shmawyers, abusing the privilege by writing secret CYA opinions for their clients, we would have no reason to allow the privilege to stay intact.

There are other tangible perks as well. We grant many professionals licenses that enhance their incomes by limiting the market. We allow professions to regulate themselves. We finance research into medicine, psychology, and anthropology, and publicly underwrite loans so that students can pursue their studies in these fields. More intangibly, we reward these professionals with prestige, respect, and in many cases trust.

All of these are goods that we—the larger social "we"—grant on a certain understanding of what the professions are. It is not at all clear that we would grant the same goods and respect to shmactors, shmawyers, shmychologists, and shmanthropologists.

Of course, what "we" think about torture can change too. In October 2005, the Pew Foundation surveyed Americans, asking them "Do you think the use of torture against suspected terrorists in order to gain important information can often be justified, sometimes be justified, rarely be justified, or never be justified?" Only one out of three thought that torture can never be justified, while fifteen percent thought it can often be justified.<sup>59</sup>

That circles us back to the enormous popularity of 24 and the distracting pseudo-debate about ticking bombs that I began with. Since 9/11, we have become a country both frightened and angry, and it should come as no surprise if frightened, angry publics develop an appetite for inflicting suffering and humiliation on those they blame. It wouldn't be the first time. A Gallup poll during World War II found that thirteen percent of Americans wanted to kill all Japanese.<sup>60</sup>

Our current flirtation with Jack Bauer stands in sharp contrast to the national

commitment we undertook when the U.S. Senate ratified the Convention Against Torture two decades ago. One article of the Torture Convention reads: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>61</sup> We used to take that for granted, and it remains a touted international commitment of the United States.

So we who aren't in the professions also need to do some soul searching.

We need our own debate over who we are and what we stand for. That debate will determine whether we are willing to support professions that permit their members to participate in "outrages on personal dignity." Personally, I hope that we are not willing to support them. I would not like to see professionals engage in such activity without paying a heavy price.

In the end, then, I've expressed doubt that Hippocratic, anti-torture prohibitions belong to some kind of logic internal to the professional expertise

itself. But I don't disagree with the anti-torture prohibitions. Instead, I've suggested that professionals who oppose participation in torture and cruelty need to fight for the souls of their profession on fundamental grounds: not that torture and cruelty violate the logic of the profession, but that torture and cruelty are repugnant. And the rest of us need to carry on the same argument. We need to turn off the TV and start thinking and talking.

#### NOTES

[This paper was originally delivered as the keynote address at the 2007 meeting of the Association of Practical and Professional Ethics. At the editor's suggestion, I have largely left it in its original to-be-spoken form. New developments in recent months have required some substantive revisions.]

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22 *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

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