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Tragic Choices in the War on Terrorism: Should We Try to Regulate and Control Torture?

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What should be done about the problem of torture in the war on terrorism? Which is better—or worse: the continuation of a principled but ineffective “ban” on torture, or an effort to seriously regulate and control torture, at the price of its partial legitimization?

Until 11 September 2001, the issue scarcely arose. Since the end of the eighteenth century, nearly every civilized society and moral system, certainly including the Judeo-Christian, or Western, moral system, in principle (although not always in practice) has regarded torture as an unmitigated evil, the moral prohibition against which was to be regarded as absolute.¹ Since September 11, however, many Americans—not just government officials, but a number of moral and legal philosophers, as well as media commentators—are far from sure that torture must be excluded from our defenses against truly catastrophic terrorism. In any case, there no longer can be any question that since September 11, agencies of the American government, particularly the armed forces and the Central Intelligence Agency (CIA), have systematically used various forms of physical and psychological coercion, beatings, or even outright torture (especially “waterboarding,” or near-drowning) on suspected terrorists, both directly, as in Afghanistan, Iraq, and Guantanamo Bay, or indi-

¹For a brief history of the use of torture in European judicial systems and practice, see James Ross, “A History of Torture” in Kenneth Roth, Minky Worden, and Amy D. Bernstein, eds., *Torture: Does it Make Us Safer? Is It Ever OK?: A Human Rights Perspective* (New York: Human Rights Watch, 2005), 3–17.

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rectly, by turning over suspected terrorists to allied states that are known to torture.²

To be sure, in some cases, lower-level soldiers have apparently gone beyond what was authorized, or at least tacitly condoned. However, various reports and investigations have left no serious doubt that the overall use of methods that have long been considered to amount to torture, or something close to it, have been either authorized, defended as legal, or, at a minimum, condoned at the highest levels of the American government, apparently including Secretary of Defense Donald Rumsfeld, if not beyond him.³

Assuming that this assessment is accurate, what can be done about it? Even more pointedly, what *should* be done about it? I will address these issues in the framework of traditional just-war analysis, a very useful perspective that often has been neglected in the recent discussions about torture. My premise is that the war on Islamic terrorism is indeed legitimately regarded as a war, however untraditional; if so, I will argue, the issues raised by torture should be regarded as simply a special case of the issues raised by any normally unjust means that may or may not be employed in a just war.

There are essentially three positions that can be taken about the problem of torture. The first is the traditional moral position: torture is categorically (that is, absolutely) prohibited, and there are no exceptions.

²These practices have been revealed in reports by the International Red Cross, Human Rights Watch, and Amnesty International; by a number of investigative reporters; and even by internal American military investigations that have been leaked to the press. The most detailed and authoritative works are Amnesty International, "Guantanamo and Beyond," May 2005; Mark Bowden, "The Dark Art of Interrogation," *Atlantic Monthly*, October 2003, 51–76; Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Torture* (New York: New York Review of Books, 2004); Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004); Human Rights Watch, "Torture in Iraq," 25 September 2005; Joseph Lelyveld, "Interrogating Ourselves," *New York Times Magazine*, 12 June 2005, 36–69; Jane Mayer, "The Experiment," *New Yorker*, 11 and 18 July 2005; PBS *Frontline* Special Report, "The Torture Question," 19 October 2005. See also Carlotta Gall, "Rights Group Reports Deaths of Men Held by U.S. in Afghanistan," *New York Times*, 14 December 2004 and 19 December 2005; David Johnston and James Risen, "The Reach of War: The Interrogations," *New York Times*, 27 June 2004; David Johnston, "Rights Group Cites Rumsfeld and Tenet in Report on Abuse," *New York Times*, 24 April 2005; Warren Hoge, "Investigators for UN Urge U.S. to Close Guantanamo," *New York Times*, 17 February 2006; Douglas Jehl, "Report Warned on CIA's Tactics in Interrogation," *New York Times*, 9 November 2005; Anthony Lewis, "Making Torture Legal," *New York Review of Books*, 15 July 2004; Eric Schmitt and David Rohde, "About 2 Dozen GIs to Face Trial or Other Punishment in Deaths of 2 Afghan Prisoners," *New York Times*, 2 September 2004.

³For a summary of the evidence that torture and actions "tantamount to torture" (in the language of a report by the International Red Cross) are "a direct product of an environment of lawlessness, created by policy decisions taken at the highest levels of the Bush Administration," see Kenneth Roth, "Justifying Torture" in Roth, Worden, and Bernstein, eds., *Torture: Does It Make Us Safer?*, 191. For a similar assessment, charging that the Bush Administration had made "a deliberate policy choice" to employ abusive interrogation in the interrogation of terrorism suspects, see the 2005 Annual Report of Human Rights Watch, summarized in "Rights Group Assails the U.S. Over Abuse of Terror Suspects," *New York Times*, 19 January 2006.

The second position is that the legal and moral norm of categorical prohibition must be maintained in principle, law, and rhetoric—even as we recognize and tacitly accept that there might be certain exceptional circumstances in which there is a strong case for overriding the norm. Thus, although we should not provide the authorities with any institutionalized or advance authorization for torture, in the exceptional cases we may rightfully decide not to punish those representatives of the state who have violated the norm. “We’ll do what we have to do,” as Joseph Lelyveld puts it: “Don’t ask, don’t tell.”⁴

The third position is that terrorism—especially but not necessarily limited to terrorism with weapons of mass destruction (WMD)—is likely to be a long-term if not permanent threat and is so grave that “exceptional circumstances” have become the norm. Consequently, the task today is to create some type of legal and institutional framework for the regulation and control of torture, to ensure that it is resorted to in the war on terrorism *only* when the consequences of not doing so are so terrible as to outweigh the terrible nature of torture itself.

I shall defend the third position, arguing that the question of means in just wars must be considered from two different perspectives (sometimes complementary, but sometimes in conflict): that of national security, and that of morality or justice. Proceeding from that premise, I shall argue that in the war on terrorism, physical or psychological coercion and, in especially exceptional circumstances, even outright torture may be defensible from both of those perspectives, certainly from the perspective of national security, and even—as a lesser evil—in terms of moral consequences. At the same time, however, the risks that torture will be used—indeed, is already being used—when it is *not* defensible from either perspective are so great that serious institutional controls over torture must be established.

Perhaps I should add this: in making this admittedly painful argument, it is not my intention to be polemical. The torture issue is no longer considered to be beyond—or beneath—debate. My purpose here is to join this emerging debate, both at the analytical level and to make explicit the arguments and policy suggestions that seem to follow from the analysis. However, inasmuch as we are still at an early stage in this debate, those who are participating in it may well make logical, moral, or empirical errors; if these occur, they can be corrected only by further debate.

DEBATING TORTURE: THE RECENT LITERATURE

Until quite recently, there has been considerable doubt among moral, legal, and political philosophers about whether there ought to be any public debate about torture. Most of these thinkers believed that torture should be regarded as simply beyond the pale; public discussion or debate might have the perverse consequence of legitimating it. Indeed, even the few scholars who argued that

⁴Lelyveld, “Interrogating Ourselves,” 69.

torture could sometimes be seen as a lesser evil sometimes conceded that the risk of legitimation precluded public discussion. Whatever the validity of this concern, the issue is now moot. In the last few years, there have been a number of discussions of the torture issue in leading media, as well as in academic conferences and, especially, in the recent publication of major works by some of America's leading political, legal, and moral thinkers.⁵ Thus, the meta debate (that is, should there be a debate?) is effectively over, and the substantive debate has begun.⁶

The main issues in this debate are these: What constitutes torture? Should all forms of physical or mental coercion be considered torture? If so, should all of them be unconditionally prohibited? If, on the other hand, it is legitimate to make distinctions, where is the line to be drawn? Are there real-world cases in which some kinds of coercion—or perhaps, in extreme cases, *any* kind of coercion, including torture by any definition—are morally justifiable, if only by a lesser-evil argument? If so—and in the context of the existing realities, this may be the most important question of them all—how can coercion or torture be limited to only those cases in which it is indeed a lesser evil?

What Is Torture?

Surprisingly, the very definition of torture has become more controversial in the last few years, and efforts to clarify it for both legal and moral purposes have created a dilemma: if it is defined too broadly, it fails to make morally relevant distinctions, but if it is defined too narrowly, it opens the door to various euphemisms that may seem to condone many forms of severe prisoner abuse that fall outside the definition.

According to all the major dictionaries, torture means more than the infliction of physical duress, stress, or even mere pain; it consists of the infliction of “intense,” “excruciating,” “great,” or “severe” pain.⁷ Similarly, the UN

⁵ The major works that will be examined here are Karen J. Greenberg, ed., *The Torture Debate in America* (New York: Cambridge University Press, 2006); Philip B. Heymann and Juliette N. Kayyem, *Protecting Liberty in an Age of Terror* (Cambridge, MA: MIT Press, 2005); Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ: Princeton University Press, 2004); Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004); Roth, Worden, and Bernstein, eds., *Torture: Does It Make Us Safer?*; Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004).

⁶ A useful discussion of the meta debate can be found in Oren Gross, “The Prohibition on Torture and the Limits of the Law” in Levinson, ed., *Torture: A Collection*, 249–250. Gross concludes that public debate on torture is critical: “The alternative to no debate ... (or, indeed, to discussion that merely consists of repeating the mantra that torture must be absolutely prohibited) is not the disappearance of the practice of torture. ... By not discussing [torture] ... we do not make it go away; we drive it underground. ... We may as well make ... choices in as informed a manner as possible, taking into account the widest panoply of relevant moral and legal considerations.”

⁷ See Webster's Third New International Dictionary, the Oxford English Dictionary, and Cambridge International Dictionary.

Convention Against Torture (to which the United States is a party) distinguishes between torture (“any act by which severe pain or suffering, whether physical or mental, is inflicted”) and “other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture.” Although both are legally prohibited, only “torture” is done so in absolute terms: “No exceptional circumstances whatsoever, whether a state of war...or any other public emergency, may be invoked as a justification of torture.”

Pentagon officials and legal advisers to the administration of George W. Bush have relied on these dictionary and UN definitions to deny that recently revealed U.S. interrogation measures—such as hooding prisoners, keeping them naked, binding them in painful “stress” positions, threatening them with dogs, subjecting them to sustained loud noises as well as heat and cold, or depriving of them sleep—constitute torture. In their initial position (the Bybee memorandum), Bush legal advisers sought to narrow the definition even further, taking advantage of the UN language in order to distinguish interrogation methods that were “merely” cruel, inhuman, or degrading from outright torture, defined as actions that “produce pain and suffering...equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”⁸ However, after severe criticism, the Justice Department formally retreated from the Bybee memorandum in late 2004; the Bush administration now officially accepts that any “severe” physical and mental pain and suffering constitutes torture and is therefore prohibited by U.S. as well as international law.⁹

In some recent discussions of the torture issue, the varying administration distinctions have been regarded as meaningless or hypocritical, mere euphemisms that are designed to conceal the harsh reality that “at the highest levels of the Pentagon there was an interest in using torture as well as a desire to evade the criminal consequences of doing so.”¹⁰ Yet, although lawyers for the Bush administration are hardly disinterested parties in the debate over torture, it is undeniable that most of the other major participants in the ongoing debate are agreed on the need to distinguish torture from lesser abuses, suggesting

⁸ Memorandum from Assistant Attorney General Jay Bybee, 1 August 2002, reprinted in Danner, *Torture and Truth*, 115, 141.

⁹ On the revised administration position, see a statement of Secretary of State Condoleezza Rice, in Joel Brinkley, “U.S. Interrogations Are Saving Lives, Rice Says,” *New York Times*, 6 December 2005, and Neil A. Lewis, “U.S. Spells Out New Definition Curbing Torture,” *New York Times*, 1 January 2005. However, a number of investigations have established that the administration has used “waterboarding” in its interrogations of captured high-level al Qaeda officials. Waterboarding—forcing a person’s head under water until he almost drowns, or at least fears drowning—is torture by any reasonable definition; nonetheless, Porter Goss, the head of the CIA, has defended it as “a professional interrogation technique.” Roth, “Justifying Torture” in Roth, Worden, and Bernstein, eds., *Torture: Does It Make Us Safer?*, 194.

¹⁰ James Fellner, director of U.S. programs for Human Rights Watch, quoted in “The Reach of War: Legal Opinions,” *New York Times*, 8 June 2004.

names like “coercion,” “physical or mental abuse,” “torture lite,”¹¹ or “highly coercive interrogation.”¹²

The case for drawing distinctions is a strong one. If we were to insist that torture must be understood as comprising all forms of interrogation that go beyond the noncoercive, we would then have to invent other words to capture the morally relevant distinctions between, say, sleep deprivation and other kinds of nonfatal physical and mental pressures and the more truly fiendish, nearly unimaginable forms of torture or murder that fanatics, sadists, or psychotic autocrats have inflicted on their victims throughout history.

That said, the rather odd distinctions in the UN Convention Against Torture will not do; the distinction between torture and “cruel, inhuman, or degrading” treatment does not seem morally compelling. Similarly, it is not clear that the distinction between “highly coercive interrogation” and “torture” is meaningful—at least not sufficiently meaningful that the former may sometimes be acceptable but the latter must always be categorically prohibited. Perhaps the best solution is to distinguish between “torture,” which should continue to be defined as the infliction of severe physical or mental pain, and “coercion,” defined as significantly less-severe measures than torture (as already mentioned, stress binding, sleep deprivation, exposure to heat and cold, and the like)—although such measures, if sufficiently intense and sustained, might well become indistinguishable from outright torture. In short, in order to maintain the dictionary and everyday usages as well as to facilitate the making of morally relevant distinctions, it is important to distinguish between torture and coercion, even though sometimes the line between them may be thin.

IS TORTURE OR COERCION EVER MORALLY ALLOWABLE?

At least among lawyers and legal scholars who are not working for the Bush administration, there is no serious doubt that not merely outright torture but all forms of “cruel, inhuman, or degrading practices” or physical coercion are illegal under American law, whether derived from the Constitution, from congressional legislation (such as the recent McCain amendment), or from international treaties to which the United States is legally bound. Thus, the central issue in the current debate is—or should be—whether the terrorist threat has made current law outmoded, considered from the perspectives of both national security and morally acceptable consequences.

As is widely understood, the most extreme case that would test the existing categorical prohibitions on torture—so far hypothetical, but one that may not be remote in the foreseeable future—would be an apparently imminent terrorist attack against cities, using biological or nuclear weapons that could kill hundreds of thousands of innocents. Less extreme are the already-existing

¹¹ Bowden, “The Dark Art of Interrogation,” 4.

¹² Heymann and Kayyem, *Protecting Liberty*, 12.

cases, which are highly likely to reoccur—non-WMD terrorist attacks that do not destroy entire cities but do kill large numbers of innocents, as in the terrorist attacks on the World Trade Center and on the passenger trains in Madrid.

Just-war Theory and the Torture Issue

The most useful, systematic, and sophisticated framework in which to examine the moral issue of torture in the war on terrorism is just-war theory. A good place to begin is with a reexamination of the writing of Michael Walzer, the most authoritative contemporary just-war thinker,¹³ following with an assessment of two recent major philosophical books that analyze, either explicitly or inferentially, the torture issue in just-war terms: Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press, 2004), and Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004).

Both Walzer and Ignatieff consider the age-old but still perplexing issue of whether “the end justifies the means”: is it morally allowable to use unjust means if the use of them is necessary to reach a just end or realize a just cause? In broad terms, there are two different philosophical or ethical systems or traditions that consider this issue: consequentialism (or utilitarianism) and categorical morality. Consequentialist moral reasoning holds that we may morally judge actions only in terms of their practical consequences; categorical morality holds that there are certain rules or principles that must never be violated, regardless of the circumstances—or, as the Catholic moral tradition holds, evil may never be done so that good can come of it.

In general, Walzer is a categorical moralist, for he insists that we must make separate moral evaluations of the causes for which wars are fought (*jus ad bellum*) and the means by which wars are fought (*jus in bello*). Even just wars, then, are absolutely prohibited from employing unjust means, which principally means that innocent civilians or noncombatants may never be deliberately attacked. The same reasoning, it would appear, would preclude the use of torture—surely an unjust means.

There is, however, one critically important exception to Walzer’s application of categorical morality to warfare: “supreme emergency,” which “exists when our deepest values and our collective survival are in imminent danger.”¹⁴ Walzer examines the British bombing of German cities early in World War II, when Britain’s defeat seemed imminent, no other means of defense was working, and the bombing of cities seemed to have some chance of dissuading Hitler

¹³ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977); Michael Walzer, *Arguing About War* (New Haven, CT: Yale University Press, 2004). Although Walzer does not directly address the issue of torture, it seems reasonable to infer his position, both from his overall moral philosophy as well as his decision to allow the reprinting of his famous essay, “Political Action: The Problem of Dirty Hands” in Levinson, ed., *Torture: A Collection*, 61–75.

¹⁴ Walzer, *Arguing About War*, 33.

from attacking. In these circumstances of “supreme emergency,” Walzer becomes a consequentialist:¹⁵ there are no longer any prohibitions on methods that are genuinely necessary to win a just war, not even indiscriminate bombing of cities. In his recent work, Walzer puts it this way: “When our deepest values are radically at risk, the constraints lose their grip, and a certain kind of utilitarianism reimposes itself. I call this the utilitarianism of extremity, and I set it against a rights normality. ... No government can put the life of the community itself and of all its members at risk, so long as there are actions available to it, even immoral actions, that would avoid or reduce the risk.”¹⁶

To be sure, not everyone accepts Walzer’s supreme emergency argument, but for those who do (like this author), the same logic must hold true for torture. That is, if it is not categorically prohibited to deliberately attack many thousands of innocent civilians if and when no other means in a just war are available to ensure the literal survival of entire societies, then it is hard to see why it should be absolutely forbidden to torture terrorist combatants if it is necessary to do so to save cities—or even, perhaps, when the stakes in terms of innocent lives are very high but short of constituting a supreme emergency. I shall return to this argument below.

It is an observable and unsurprising fact that in this debate, there is a direct relationship between how seriously one takes the threat of mass-casualty terrorism and the position one takes on the torture issue. Some of those who are participating in the recent debate seem to implicitly or even explicitly minimize the threat.¹⁷ That is not the view, however, of the National Commission on Terrorist Attacks Upon the United States (hereinafter, 9/11 Commission), which cited the evidence that Osama bin Laden and al Qaeda have been actively seeking to acquire WMD, nor of most academic specialists in international security—particularly those who have some governmental experience in either defense or intelligence agencies.¹⁸

¹⁵ But *only* in these circumstances, as opposed to the later British and American city bombings of Germany and Japan, when the allied victory was already assured.

¹⁶ Walzer, *Arguing About War*, 40, 42.

¹⁷ For example, the journalist and commentator William Pfaff writes that to most of the democratic world, the American claims about the threat of terrorism seem grossly exaggerated, and therefore U.S. behavior is disproportionate. William Pfaff, “What We’ve Lost: George W. Bush and the Price of Torture,” *Harper’s Magazine*, November 2005, 50–56. Similarly, the General Counsel for Human Rights Watch clearly minimizes the dangers of WMD terrorism when she denies that “we live in an entirely different world than has ever existed at any time or place.” (Dinah Pokempner, “Command Responsibility for Torture” in Roth, Worden, and Bernstein, eds., *Torture: Does It Ever Make Us Safer?*, 171. The lawyer Joshua Dratel, the law professor Stephen Holmes, and the legal philosopher David Luban also tend to dismiss the WMD threat as exaggerated, not “realistic,” or not “representative.” Greenberg, ed., *The Torture Debate*; see especially 114, 127.

¹⁸ On the September 11th Commission’s finding, see its *Final Report*, 4 August 2004. See also the authoritative work by a leading academician and former high government official, Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe* (New York: New York Times Books, 2004). Stephen Van Evera of MIT, another leading national security expert, points out that Osama Bin

Thomas Kean, chairman of the 9/11 Commission, has summed up the consensus of the governmental and academic specialists: “We have no greater fear than a terrorist who is inside the United States with a nuclear weapon. The consequences of such an attack would be catastrophic for our people, for our economy, for our liberties.”¹⁹ Indeed, if anything, this formulation *understates* the threat: why just one nuclear weapon in one city? If organized terrorist groups succeed in acquiring and detonating one nuclear weapon in one city, what will prevent them from acquiring other nuclear weapons and detonating them in other cities?

In short, a review of the literature suggests that the more seriously one takes the threat of terrorism—especially, but not necessarily exclusively, the threat of WMD terrorism—the less persuasive are the arguments against coercive interrogations, “torture lite,” or even, in some instances, outright torture. One of the few exceptions is Michael Ignatieff, whose credentials in national security are not in doubt. Ignatieff argues for a categorical or absolute prohibition against not only torture but also physical (although not “nonphysical”) coercion. Presumably, then, he would hold to these prohibitions even in the case of a genuine supreme emergency, such as an imminent WMD attack against a city.²⁰ Leaving aside, for the moment, whether this is a morally persuasive position, it would seem to be quite anomalous in light of Ignatieff’s overall consequentialist argument that in the war on terrorism, it will be necessary to choose lesser evils to avoid even greater ones, and that included among these necessary and justified lesser evils are various forms of violence, assassinations, and perhaps even preemptive war.

Laden has explicitly said that “to kill Americans ... civilian and military—is an individual duty for every Muslim” and that al Qaeda’s press spokesman, Suleiman Abu Ghaith, “has claimed the right to kill four million Americans, including two million children.” Van Evera further notes that the leaders of al Qaeda “seek to acquire weapons of mass destruction and may also have the opportunity: enough nuclear materials remain poorly secured in Russia to make tens of thousands of Hiroshima-sized atomic bombs. Many Soviet nuclear and biological weapons scientists also remain underpaid or unemployed, ripe for hiring by terrorists.” Stephen Van Evera, “Why U.S. National Security Requires Mideast Peace,” MIT Center for International Studies, May 2005, 1–2.

¹⁹ Quoted in Philip Shenon, “Sept. 11 Report Card Assails U.S. Progress Against Terror,” *New York Times*, 15 November 2005.

²⁰ To be sure, Ignatieff does concede that “when we have to face terrorists who control weapons of mass destruction ... most bets—and gloves—would be off.” Ignatieff, “The Lesser Evil,” 10. But this is not his judgment of what, morally speaking, should or at least must be done, but only his prediction of what realistically will happen. In a more recent essay, Ignatieff similarly hedges his argument a bit, conceding that most Americans will not agree with him, and that in a crisis they will “privilege security over liberty and thus reluctantly endorse torture in their name.” Michael Ignatieff, “Moral Prohibition At a Price” in Roth, Worden, and Bernstein, eds., *Torture: Does It Ever Make Us Safer?*, 27. Although this concession is not inconsistent with his normative position, it does suggest that categorical prohibitions against not merely torture but all forms of coercive interrogation are wholly impractical.

In the recent literature, a number of eminent lawyers, as well as political, moral, and legal philosophers, examine in forthright fashion the arguments for and against continuing to treat torture as categorically and unconditionally prohibited. Surprisingly, only a minority seem to hold to the traditional position that torture should be both defined broadly and totally banned (among them, the playwright and novelist Ariel Dorfman; Joshua Dratel, a defense attorney; the legal philosopher David Luban; and Kenneth Roth, Executive Director of Human Rights Watch).

Several other powerful condemnations of torture nonetheless end by reluctantly seeming to accept—either directly (Henry Shue) or by implication (Elaine Scarry)—that in some extreme circumstances, torturers might be able to plausibly argue that torture was necessary to avoid catastrophe. Still others would ban torture more narrowly defined, but accept “torture lite” or “highly coercive interrogation” in extreme circumstances.²¹ Several other essayists even more explicitly argue that torture should be regarded as a lesser evil in extreme cases, and still others—in particular, Jean Bethke Elshtain, John T. Parry, and Judge Richard A. Posner—suggest (either explicitly or by unavoidable implication) that even in some situations short of supreme emergency, torture might legitimately be regarded as a lesser evil.

Only a few writers, however, notably Alan Dershowitz,²² Andrew C. McCarthy (a former Federal district attorney),²³ and Heymann and Kayyem, argue that because torture (or only great coercion, for the latter writers) is sometimes necessary, the law should be changed and torture/coercion brought within the U.S. legal system, so that they can be regulated and controlled. In particular, Dershowitz argues, the security services must be required to apply to judges for “torture warrants,” in which they must present evidence that torture is required in each case in which it is contemplated. Only judges, trained to evaluate evidence and to balance competing values, such as “the needs for security against the imperatives of liberty,” should decide—openly and under the law—whether torture is (literally) warranted.

The Dershowitz proposals have been widely rejected, often with anger and contempt—a “stunningly bad idea,” in Elshtain’s words²⁴—even by those who (like Elshtain herself) accept that in some cases, torture may be the lesser evil.

²¹ See especially Heymann and Kayyem, *Protecting Liberty*, 12–13. However, given the emphasis that these authors place on protecting national security against very real threats, including the threat of WMD attack, and their willingness to countenance “highly coercive interrogation” in extreme situations, it is not easy to understand why they draw the line at torture. The explanation is probably that they give great weight to not violating the law of the land, which indeed prohibits torture—but if the threat is great and the line between highly coercive interrogation and torture is very thin, then why not simply argue for a change in the law?

²² Alan Dershowitz, “Tortured Reasoning” in Levinson, ed., *Torture: A Collection*, 257–280.

²³ Andrew C. McCarthy, “Torture: Thinking About the Unthinkable” in Greenberg, ed., *The Torture Debate*, 98–100.

²⁴ Jean Bethke Elshtain, “Reflection on the Problem of ‘Dirty Hands’” in Levinson, ed., *Torture: A Collection*, 83.

Hard cases make not only bad law but also bad ethics, it is often said. Rather than normalizing, institutionalizing, or legitimizing torture, it is argued, it is far better to continue the formal and official prohibition—even if an after-the-fact necessity defense might be available to those who authorize or engage in torture. In extreme circumstances, the consensus position holds, military and security professionals must be prepared to do what must be done, while later seeking to avoid punishment by convincing the courts or public opinion that there was no other choice.

Confronting the Arguments against Torture

Let us suppose that the security services capture someone who (on the basis of substantial evidence) is almost surely a member of a terrorist cell that is on the verge of carrying out a major attack against a city. Should this situation occur, we might ask ourselves three questions: In all likelihood, what *would* the authorities do? What *should* the authorities do? And, if torture or coercion cannot or should not be ruled out in this situation, then how can they be limited to only those situations in which they are the lesser evil?

Surely there can be no doubt about what the authorities would do in those circumstances—and in practical terms alone, that suggests the need for serious consideration of how to prevent abuses. Further, because there is an increasingly widespread understanding that the stakes are so high in the war on terrorism, especially but not limited to WMD terrorism, it seems evident that most Americans—including, as we now know, many eminent moral philosophers—would also agree that the authorities should do whatever it takes to prevent catastrophe.²⁵

It does not necessarily follow, of course, that the opinion of the public or of a number of philosophers is persuasive; the moral issue must be examined on the merits. My central argument is that the moral issue raised by torture in the war on terrorism should be regarded as no different in principle from the broader moral issues inherent in war, generally. We do not absolutely proscribe war if the cause is sufficiently just—indeed, as WMD spread, it is possible (at least in principle, although not necessarily in practice) that in some circumstances, even preemptive war might be justified. Moreover, no matter how accurate the weaponry and how hard we may try to avoid it, it is inevitable that there will be civilian casualties. If wars that will surely result in the killing of hundreds or thousands of innocent noncombatants cannot be morally prohibited if the stakes are high enough, then how can it be morally prohibited to inflict non-fatal and reversible pain on a few anything-but-innocent terrorists,

²⁵ See Oren Gross: “Most of us believe that most, if not all, government agents, when faced with a genuinely catastrophic case, are likely to resort to whatever means they can wield, including ... torture. ... *And most of us hope they will do so.*” Gross, “The Prohibition on Torture,” 249, emphasis added.

if that is the only way to save hundreds, thousands, or even hundreds of thousands of innocent lives?

Even so, before we can conclude that torture may sometimes be justified, we must first confront several practical arguments that challenge the “lesser evil” defense. First, it is often argued that torture does not work, for people will tell the torturers anything they want to hear. Although this argument has a certain surface plausibility, on closer scrutiny it is not persuasive: the historical evidence leaves no serious doubt that torture has often produced information that otherwise would not have been revealed, especially about the organization and location of members of resistance or insurgency groups. To be sure, in the overwhelming majority of such cases, the torturers had no just cause and therefore no moral right to such information, but that is another matter altogether.

Thus, leaving aside for the moment the issue of whether torture is ever justifiable, the strictly empirical issue of whether it “works” is not difficult to ascertain. There is little doubt, for example, that in the 1950s, the French torture of Algerian captives temporarily succeeded in destroying the underground revolutionary movement; similarly, there is evidence that in Ireland, British torture or coercion succeeded in gaining useful information.²⁶ More recently, there is evidence that in 2002, Sri Lanka tortured three terrorists into revealing the location of a bomb set to explode later that day,²⁷ and it is known that in “ticking-bomb” cases, Israel tortures—or, at least, inflicts physical and mental coercion upon—captured Palestinian militants, who have sometimes apparently revealed information that has prevented terrorist attacks against civilians.

Elsewhere as well, torture appears to be producing valuable information in the current war on terrorism. Dershowitz and others have cited cases in which Jordanian and Philippine torture resulted in the breaking up of terrorist plans and networks, including a plot to bring down a number of airplanes,²⁸ and both the Schlesinger and 9/11 Commission reports stated that interrogation of captured al Qaeda officials—widely known to include severe coercion and probably outright torture—has provided important information about that organization’s structure and plans.²⁹

²⁶ Heymann and Kayyem, *Protecting Liberty*, 165.

²⁷ *Ibid.*, 166.

²⁸ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002), 136–138.

²⁹ See Douglas Jehl, “Captured Terrorists Hint at New Plan, Officials Say,” *New York Times*, 13 July 2004; Douglas Jehl and David Johnston, “CIA Expands Its Inquiry into Interrogation Tactics,” *New York Times*, 29 August 2004; Bowden, “The Dark Art of Interrogation,” especially 55–56. Although the Schlesinger Report, *Final Report of the Independent Panel to Review DOD Detention Operations*, reprinted in Danner, *Torture and Truth*, 329–399, does not say that the useful information was the result of torture; in fact, it is widely known that the interrogation methods of leading suspects includes severe coercion and waterboarding. According to widespread reports, almost no one can hold out against waterboarding; for example, Joshua Dratel—a severe critic of torture—reports that a CIA station agent told him that because everyone succumbs to torture, if he were captured, he would avoid pointless suffering and simply talk immediately. Greenberg, ed., *The Torture Debate*, 21–22.

A second practical argument against torture is that in the long run, it backfires and ends by being self-defeating: it engenders implacable hatreds, hardening the terrorists in their hostility and creating new ones. The usual case cited is Algeria in the 1950s and 1960s, when despite French torture, the revolutionary movement was reconstituted and soon succeeded. “The use of torture may have won the battle of Algiers for the French, but it cost them Algeria.”³⁰

It is important, however, to notice the differences between the Algerian situation and the present one. First, the perpetuation of French colonialism in the face of the nationalist demand for liberation and independence was not a just cause, so of course, the French use of torture was not justified; there is no moral or practical dilemma if an unjust method is used to pursue an unjust cause. Secondly, it may be rhetorically effective to say that it was torture that caused the French to ultimately lose in Algeria, but it is not accurate; they resorted to torture precisely because they feared defeat if they did not—and it is hardly implausible that they indeed would have been defeated even sooner had it not been for the temporary success of torture in destroying the revolutionary movement. In other words, the French may well have lost in Algeria despite their use of torture, not because of it.

Even so, it cannot be denied that the use of torture has already had a variety of costs, including international costs. It is only too plausible that the American torture in Afghanistan and Iraq will engender new acts of terrorism—and not only in those countries, but elsewhere, including against the United States itself. Moreover, it is certainly possible that the international backlash against torture in the war on terrorism—especially torture that is clearly illegitimate by *any* defensible criteria, as in Afghanistan and Iraq—will lead some otherwise friendly countries to refuse to cooperate or to minimize their cooperation with American intelligence efforts.

Still, in the final analysis, if torture and coercion are confined—as they should be—to protecting large numbers of innocent human lives, then it is not necessarily convincing to argue that in the long run, the political costs will be too high. To begin with, long-run political costs are inherently difficult to predict, and might well be minimized if torture was seriously controlled and plausibly necessary to save many innocent lives. Beyond that, the immediate stakes may be so high that they preclude guesswork about long-run consequences. And in the limiting case of WMD terrorism, the classic rejoinder to the long-run consequences argument—in the long run we’ll all be dead—is redundant: if we fail to prevent WMD terrorism, by whatever action it takes, in the *short* run we’ll all be dead.

Perhaps the most troubling of the arguments against torture in extreme circumstances is the innocence problem. Undoubtedly, there cannot be complete certainty that the person being tortured really has useful knowledge of an impending terrorist attack, but we do know that almost inevitably, errors will be

³⁰ Donald P. Gregg, “Fight Fire With Compassion,” *New York Times*, 10 June 2004.

made—indeed have already been made in Afghanistan, Guantanamo, and Iraq, where a number of investigative reports have concluded that many innocent civilians have been abused by American forces.³¹

Given the stakes, however, in this writer's reluctant judgment, the innocence problem, tragic though it is, cannot be regarded as a decisive argument for a categorical prohibition of torture—after all, the criminal justice system also suffers from less than 100 percent reliability, but we do not abolish prisons on that account, even though we know that many innocents inevitably will pay a very high cost. Moreover, painful as it is to contemplate, it is hard to avoid the conclusion suggested by Alan Dershowitz and Richard Posner: “The dogma that it is better for ten guilty people to go free than for one innocent person to be convicted may not hold when the guilty ten are international terrorists who, moreover, are seeking and may succeed in obtaining weapons of mass destruction.”³²

What does follow, however, is that we must take the innocence problem very seriously, and take whatever steps we can to minimize it. Indeed, it is the very possibility of error that strengthens the argument for serious institutional controls over torture, to ensure that the evidence requiring it is very strong, or that it is stopped if it becomes increasingly likely that the victim either is innocent or has no further information that we are entitled to have.

SHOULD TORTURE BE REGULATED AND CONTROLLED?

I have argued that torture (or coercion) in the war on terrorism is both inevitable, and in some circumstances, justifiable as a lesser evil than unchecked terrorism. If that is persuasive, it would seem to follow that torture should be minimized, regulated, and controlled by subjecting it to the rule of law. On the other hand, there are powerful arguments against seeking to do so, so we must first address these arguments.

The Price for Ending Hypocrisy Is Too High

Some skeptics about the need for or desirability of institutionalizing controls over torture concede that torture in the war on terrorism is inevitable—and perhaps even in some circumstances, a lesser evil than otherwise-unsuccessful efforts to prevent the mass murder of innocents—and that therefore it is true that our professed absolute rejection of torture is hypocritical. Even so, their argument is that total consistency is not truly necessary; occasional hypocrisy

³¹ For brief discussions of the innocence problem, see Elaine Scarry, “Five Errors in the Reasoning of Alan Dershowitz” in Levinson, ed., *Torture: A Collection*, 281–290; and Ross, “A History of Torture,” 9–10.

³² Richard A. Posner, “Torture, Terrorism, and Interrogation” in Levinson, ed., *Torture: A Collection*, 295.

may be a tolerable price for a political order to pay, especially if the alternative price—abandoning long-held norms prohibiting torture—is too high.

On the other hand, hypocrisy also may have serious costs. As McCarthy has argued, “By imposing an absolute ban on something we know is occurring, we promote disrespect for the law in general.”³³ In any case, the ending of hypocrisy is not the main argument for institutionalizing controls over torture as well as less-intense kinds of coercion. Rather, it is that the price we pay for the current situation—uncontrolled, unregulated, unaccountable, and typically unpunished torture that cannot be justified by a lesser-evil argument—is higher than the undoubted price we would pay by abandoning the fiction that torture can *never* be justified by a lesser-evil argument.

The Legitimization Problem

A second argument against seeking to control torture is that the effort to do so will “legitimize” torture and thus, presumably, make it even more prevalent. Some writers have drawn an analogy between torture and the development of the absolute prohibitions against slavery or genocide. Not so long ago, they argue, slavery was also thought to be “inevitable,” and it would appear that genocide is still inevitable, yet we do not say that because slavery and genocide are inevitable, we should try to minimize and regulate them.

This argument is surely right about slavery and genocide, but it ignores the crucial distinction between those unconditional evils and the evil of torture: slavery and genocide are *never* a necessary (but evil) means to a desirable end. Thus, there can be no consequentialist argument to be made on behalf of slavery or genocide. Put differently, because there is no conceivable end that would justify slavery or genocide, these cannot be “lesser evils” to anything. Tragically, in the world in which we now live, we cannot say that about torture.

In any case, to say that a formerly banned practice has become “legitimized” can be understood in two senses. First, it may be understood as an empirical statement: as a matter of fact, like it or not, the practice has become widely accepted. Second, it may be understood normatively, meaning that what was previously thought to be categorically wrong in a moral sense is no longer so regarded.

If this deconstruction of the term “legitimize” is correct, then, the argument against controls may be becoming moot. Understood in its empirical sense, torture is well on its way to be becoming “legitimized” in the United States, for scarcely a week goes by without new revelations of American torture—directly, by American soldiers or CIA personnel and indirectly, through “rendering” suspects to foreign collaborators. To be sure, recently, there has been growing congressional concern over the torture issue, but there is reason to be skeptical about whether this concern will be sustained and result

³³ Greenberg, ed., *The Torture Debate*, 108.

in real controls over torture. Beyond a handful of courts martial prosecutions of soldiers near the bottom of the chain of command, as of early 2006, very little had been done by the armed forces, the administration, or Congress to seriously investigate, let alone punish, those guilty of ordering, condoning, or acquiescing in the American torture or outright killing of alleged terrorist suspects in Afghanistan, Iraq, or Guantanamo.³⁴

Moreover, it is evident that most of the cases of torture are not in response to “ticking-bomb” situations—even of conventional bombs, let alone WMD; nor has the practice been limited to torture of high-level officials of terrorist organizations, who presumably know of plans for mass-murder terrorism. Indeed, according to newspaper reports and several international non-governmental organization investigations, some 70–90 percent of Iraqis rounded up by American soldiers were neither terrorists nor insurgents.³⁵ Consequently, it appears that most of the actual cases of torture or coercion cannot be defended as necessary in the war on terrorism; they remain greater evils, not lesser ones. Under these circumstances, the argument here is that on balance, the need for effective controls over torture outweighs the not-unreasonable concern that controls will succeed only in legitimizing and perhaps even increasing torture.

Judicial Controls Are Often Ineffective

A similar set of arguments point to the well-known problems of judicial control of state authorities. For example, a number of critics of Dershowitz’s call for advance judicial authorization—“torture warrants”—point out that the existing criminal warrant system is frequently abused by the police, who may either gather evidence illegally or plant evidence even after getting warrants.

Indeed, for that matter, we cannot assume that the judges themselves are immune from politics, ideology, or simple error—Luban argues that “politicians pick judges, and if the politicians accept torture, the judges will as well,” and tellingly observes that Jay S. Bybee (of the infamous Bybee memorandum) is now a federal judge.³⁶ In the same vein, other critics have noted that judges are not the voice of pure law or reason, but rather actual people operating within a particular (and fallible) institutional structure. Moreover, where will they come from? Will they be elected, or chosen—and if so, by whom? For these and other reasons, it cannot be simply assumed that judges will be either independent or wise.

These are all legitimate and cogent observations and criticisms, but in my judgment, they are not decisive. Of course, the judicial system is flawed in a

³⁴ For an impressive marshalling of the evidence, see Roth, “Justifying Torture,” 184–201.

³⁵ Even the semi-official Schlesinger Report conceded that American soldiers had rounded up “any and all suspicious-looking persons—all too often including women and children,” and that “some individuals seized the opportunity provided by this environment to give vent to latent sadistic urges.” Reprinted in Danner, *Torture and Truth*, 344.

³⁶ Greenberg, ed., *The Torture Debate*, 51.

variety of ways, and undoubtedly any efforts to control and regulate the use of torture by means of that system would be difficult and would sometimes fail. But compared to what? Compared to the current system, in which torture is largely uncontrolled, especially when ordered or tolerated by officials at the top of the system, who are not held accountable for their behavior? Is justice more likely to emerge from a system of no accountability, or one that demands accountability and the adherence to the rule of law, however short of perfection that system falls?

In any event, it should not be beyond our capacity to improve the existing system, and to devise effective principles, procedures, and institutions to control torture, in order to ensure that it is resorted to only when an overwhelming emergency leaves no other rational or, indeed, morally defensible choice. A good place to begin is by ending the current practice of “rendition”—turning over suspects to allied governments that have no compunction about torture. In this case, for several reasons, categorical prohibition is appropriate. First, on its face, rendition is particularly sleazy, designed as it is to evade U.S. legal prohibitions against torture. Moreover, it is widely *seen* to be sleazy, and it has been so widely exposed that it has defeated the purpose of giving the U.S. government “plausible deniability” that it uses torture in the war on terrorism; indeed, in the eyes of much of the world, including the West, hardly any accusations against the American government—probably even those that are false—are any longer plausibly deniable.

Further, although torture in general entails the risk that false confessions will result, rendition is especially likely to do so, for governments who are anxious to demonstrate their value to the United States have much less incentive to be skeptical and to verify all such “intelligence.”³⁷ Finally, rendition is obviously inconsistent with the need to develop a system of executive, legislative, and judicial controls over torture and coercion.

An institutionalized process for controlling torture would begin with some kind of system of advance authorization—something like Dershowitz’s “torture warrants,” perhaps, but one that would be less likely to suffer from the problems (police evasions, dishonesty in gathering evidence, and other abuses) that sometimes occur in the existing judicial warrant system. In any case, judicial control of coercion and torture should not be limited to an authorization

³⁷ For example, there have been a number of reports that the Bush administration based its claim that the Saddam Hussein government in Iraq was linked to al Qaeda on a “confession” made by a high-level operative captured by American forces and turned over to Egypt for interrogation under torture, a statement later recanted when the al Qaeda leader was no longer in Egyptian custody. Douglas Jehl, “Qaeda-Iraq Link U.S. Cited is Tied to Coercion Claim,” *New York Times*, 9 December 2005. See also a television interview of Craig Murray, the former British Ambassador to Uzbekistan, another U.S. ally that cooperates with American rendition policy. Murray states that many “confessions” obtained under particularly horrible forms of torture by the Uzbekistan government have been demonstrably false, producing dangerous misinformation in the war on terrorism. (Murray’s testimony is in *Torture*, a British documentary televised on the Sundance channel, 12 December 2005.)

process, but must also encompass post-facto judicial review, sanctions when appropriate, and judicial remedies for those wrongly tortured.

How, precisely, would a system of judicial control operate? Andrew C. McCarthy, a former Assistant U.S. District Attorney and currently a law professor, has suggested the creation of a single federal “national security court.” Such a court—perhaps similar to the existing special federal court that decides whether U.S. intelligence agencies can engage in domestic spying—would allow the judges to develop expertise in matters of national security.³⁸ Any violations of the legal norms, rules, and procedures—at any level, in principle up to and including the Commander in Chief—must be treated as impeachable offenses or outright crimes, and if serious enough, punishable by jail terms.

Moreover, controlling coercion and torture in the war on terrorism should be the responsibility not only of the judiciary, for Congress could and should also play a much greater role, not only through legislation, but also by more vigorous use of its investigative and oversight powers, to ensure that the executive branch is complying with the law.

Other than these general suggestions, it is beyond the scope of this paper—and certainly beyond this author’s competence—to provide a detailed prescription for how the current system can be improved.³⁹ My premise is that a recognition of the problem, together with a serious will to deal with the torture issue in a manner that both protects national security and is morally defensible, could find institutional expression.

Even so, in the final analysis, it cannot be denied that any system of institutionalized controls over torture must rely to a certain extent on trust that the authorities—especially at the top of the political system—will not seek to evade and bypass them. In this context, it is instructive to consider the McCain Amendment, now the law of the land, and President Bush’s reaction to it. In signing McCain—which purports to categorically prohibit not merely torture but also the “cruel, inhuman, or degrading treatment” of any terrorists captured by the United States—Bush issued a statement in which he reserved the right to interpret it according to his own judgment of the constitutional authority of the president, especially in his capacity as Commander in Chief of the armed forces.

In view of the administration’s overall record, then, there is every reason to suspect that in some circumstances, it will seek to avoid the McCain prohibi-

³⁸ Greenberg, ed., *The Torture Debate*, 109–110. To be sure, it is ominous that the Bush administration chose to bypass this court in certain circumstances, but its actions have generated a number of lawsuits and a considerable uproar in public opinion and in Congress. Perhaps, then, the existence of the special court may yet prove to be an effective constraint on executive overreaching. Once again, though: whatever the outcome, it would hardly follow that a system of no judicial authorization and review would be better.

³⁹ However, for a number of detailed suggestions on how all three branches of the government can improve the institutions and procedures for controlling “highly coercive interrogation,” see Heymann and Kayyem, *Protecting Liberty*, especially 35–39.

tions. Moreover, even McCain himself has conceded that his legislation would not (should not?) apply to a “million to one” extreme ticking-bomb situation, in which the “the president will authorize whatever techniques he thinks will work,” but should take responsibility for doing so.⁴⁰

In short, it is not yet knowable whether the McCain amendment, the first serious effort to assert legislative control over the executive branch on how the war on terrorism may be fought, will be effective or indeed *should* be effective in extreme circumstances—even, apparently, in the eyes of its architect. But it does not follow that this early effort to institutionalize controls over torture demonstrates the futility of trying to do so. For one thing, the McCain amendment could well prove to be a significant constraint when it should be, if not on Bush, then perhaps on future presidents, as well as on the professionals in the CIA, the Pentagon, and the armed forces.

Beyond that, once again we must ask: compared to what? If a genuine, total, and unconditional ban on coercion or torture in the war on terrorism is neither practical nor wise, serves neither the requirements of national security nor of morally acceptable consequences, then it is hard to see why the present, largely uncontrolled system should be regarded as more trustworthy.

THE CRITERIA GOVERNING TORTURE

What moral criteria or principles should guide a system of judicial controls? Just-war theory provides the appropriate guidelines: just cause, last resort, and proportionality.

Just Cause

As in decisions to go to war, an unambiguously just cause is a necessary precondition of resorting to either severe coercion or outright torture—otherwise, of course, torture could never meet the lesser-evil criterion. Because of the terrible nature of this method, just cause should be interpreted particularly narrowly to exclude any purpose other than clear self-defense against terrorist attacks on civilian populations.

To be sure, as already noted, a common objection to making just cause a criterion for justifying torture is that it may be abused by untrustworthy governments. For example, Levinson asks: “Why in the world would we necessarily trust a highly politicized state elite, with its own potential political interests in creating a perception of danger,” to decide when a genuine catastrophe exists?⁴¹ A legitimate concern, certainly—but no different from allowing states to go to war on the basis of “self-defense,” or, for that matter, on humanitarian

⁴⁰ Associated Press, “McCain Makes Exception on Torture,” *Buffalo News*, 20 December 2005; David E. Sanger and Eric Schmitt, “Bush Says He’s Confident that He and McCain Will Reach Agreement on Interrogation Policy,” *New York Times*, 13 December 2005.

⁴¹ Sanford Levinson, “Contemplating Torture” in Levinson, ed., *Torture: A Collection*, 33.

grounds. Both self-defense and humanitarian intervention can be abused (as some observers would argue was the case in Iraq), providing pretexts rather than convincing justifications for the use of force. Nonetheless, we do not throw out the principles. In short, as in the broader principle of self-defense, an argument justifying torture in catastrophic circumstances is just that—an argument, and one that may or may not be persuasive, or even honest. There is no way around the problem, but the alternative—no limiting criteria—is worse.

That said, it is important to make a number of distinctions, even within the framework of self-defense. There are at least three possible scenarios, unfortunately all, to one degree or another, realistic ones, in which the issue of torture is certain to be—and must be—considered: the capture of terrorists at the field level who are about to engage in WMD attacks on cities, the capture of terrorists about to engage in non-WMD attacks on cities, and the capture of terrorist leaders who are planning or who know about the plans for future major terrorist attacks.

Let us begin with consideration of the easiest case: preventing the destruction of entire cities. Assume, in the usual fashion, that the authorities have captured a member of a terrorist cell and that the evidence is very strong that he has information that could prevent an imminent WMD attack. As discussed earlier, preventing such an attack constitutes a supreme emergency (in Walzer's terms) or "an ultimate catastrophe," in the terminology of several contributors to the Levinson book. To repeat an earlier point: if early in World War II, a genuine supreme emergency (avoiding defeat at the hands of Nazi Germany) allowed Britain to legitimately override the principle of noncombatant immunity by deliberately killing (through bombing of cities) tens of thousands of German civilians—some of them, undoubtedly, strongly opposed to Hitler—then it is hard to see why torture of a few non-innocent terrorists in a different but genuine supreme emergency should be regarded as beyond the pale.

The case for torture to prevent more-limited attacks is obviously less overwhelming. Even so, non-WMD attacks can also kill thousands of innocents, as on September 11, or perhaps "merely" hundreds, as in the Madrid railroad bombing. Although short of constituting supreme emergencies, such conventional attacks may well be sufficiently catastrophic to justify torture if there is no other way to avert them. Suppose, for example, that on 10 September 2001, the authorities, learning of an impending massive attack in the United States but not knowing where or by what means, had captured Mohammed Atta or one of the other leaders of the attack on the World Trade Center, and all other efforts to gain the necessary information had failed? Who would have wished to argue that torture would have been illegitimate even if it had succeeded in preventing the attack?

To be sure, it is certainly the case that this is a troubling line of thought. As one internal critic of U.S. government torture asked: "How many lives [have] to be saved to justify torture? Thousands? Hundreds? Where do you draw the

line?”⁴² A cogent and disturbing question indeed, and one that is impossible to answer in the abstract. Yet, in actual and specific cases, such as September 11, the answer may be reasonably apparent.

The ticking-bomb cases aside, the third scenario in which torture or at least “highly coercive interrogation” must be considered is the capture of high-level al Qaeda leaders (already a reality, as we now know)—or, perhaps eventually, Iraqi terrorist leaders, like Abu Masab al-Zarqawi—who, after some period of regular interrogation, are refusing to talk about their organization or plans for future attacks. Because large numbers of innocent lives are genuinely at stake in such cases, as well as in obvious ticking-bomb situations, it is hard to see why torture (when both normal interrogation and coercion short of torture had failed) should be ruled out. Indeed, such cases might also constitute ticking-bomb situations—for all we know, major attacks might well be imminent.

Put differently, because the key to winning the war on terror is accurate intelligence, it is not evident that there is a compelling national security *or* moral distinction between using methods genuinely necessary to extract tactical intelligence to prevent imminent attacks and using those necessary to extract strategic intelligence (information about the organization, finances, membership, and location of terrorist groups) in order to prevent future attacks.

Last Resort

As has been already suggested, it is morally obvious that torture can be legitimately resorted to only in order to extract information that is crucial to save innocent lives, and then only when other methods of gaining the necessary information have been tried and failed: that is, normal methods of interrogation or even various forms of physical or psychological coercion, short of outright torture.

Moreover, neither coercion nor torture can ever be resorted to—and this *is* a categorical prohibition, one for which it is impossible to imagine any exceptions—for any purpose other than an urgent need to avert a catastrophe: not to humiliate, not to punish, not to take revenge. It is now evident that the U.S. armed forces violated this prohibition in Afghanistan and, especially, Iraq. Under a system of serious controls, any torture that was not a last resort and was for illegitimate purposes would be severely punished. And that would include anyone in the chain of command—right to the top—who ordered, authorized, or merely acquiesced in torture for such purposes.

Proportionality, or the Sliding Scale

As discussed earlier, it is a well-established principle in Western morality—or, more accurately, one to which we give lip service—that “the end doesn’t justify

⁴² Jane Mayer, “Annals of the Pentagon: The Memo,” *New Yorker*, 27 February 2006, quoting Alberto Mora, the former general counsel of the U.S. Navy.

the means.” Given the current realities, however, it would appear that we can no longer afford to insist that the moral judgments we make about means (*jus in bello*) be entirely separate from the judgments we make about ends (*jus ad bellum*).

Philosophers generally agree that moral constraints on behavior cannot be impossible of realization—that is, so demanding that they are antithetical to human nature itself. In that sense, then, it would appear that it is beyond human nature to truly live by an unconditional principle that a just end never justifies unjust means, even if the end is overwhelmingly just (the prevention of mass murder) and the means (torture) are genuinely imperative to achieve it. That is, in certain circumstances the end *does* justify the means.

The argument can be put even more strongly. It is not only beyond human nature but morally unpersuasive on the merits to have an absolute ban on torture that is necessary to prevent human catastrophes. It would be both irrational, in terms of national security, and morally incoherent to place a higher value on not inflicting temporary pain on one or several terrorists than on doing what is necessary to protect both national security and innocent human lives—in the most extreme case, perhaps hundreds of thousands of innocent lives.

The guiding principle concerning torture, then, must be proportionality, or the sliding scale, in which all actions are judged by their consequences for both justice and national security. The greater the evil to be averted, the fewer the restrictions on the means that are required to do so. And if the fate of an entire city, or indeed *many* cities, hangs in the balance—and some day that may well be the case—then there can be no limits at all. When what is at stake is, for all practical purposes, an infinite evil, the guiding principle of the authorities seeking to prevent it will be, must be, and should be: whatever it takes.⁴³

CONCLUSION

If we are to succeed in the war against terrorism, we surely must do much more than defend ourselves against terrorist attacks. The broader task is to do whatever can be reasonably and legitimately done to address the causes of terrorism, as well as the motivations of terrorists to target the United States. In my view, such measures must include great changes in American foreign policy—a far more balanced policy in the Israeli–Palestinian conflict, for example, as well as a general policy of military noninterventionism, except in those few cases in which truly vital national interests are at stake. Meanwhile, though, we need to prevent attacks on American cities.

In attempting to do so, we confront a terrible dilemma. On the one hand, of course torture violates a central moral command of any civilized society;

⁴³ For a similar argument, see Posner, “Torture, Terrorism, and Interrogation,” 293.

as a number of recent writers have emphasized—as if there were contrary views that needed refuting—torture is evil, antithetical to the values for which America stands, and destructive of the souls of the torturer as well as the tortured. Similarly, it has often been said that the war on terrorism is a war to preserve American values, so that if we resort to torture “the terrorists will have won,” and the like.

On the other hand, the rhetoric does not do justice to the complexity of the problem and it will not do to simply dwell on the undoubted horrors of torture without consideration of the even greater horrors entailed in the mass murder of innocents. The crisis is unprecedented, the stakes are catastrophically high, and values are in conflict. Self-defense and the protection of innocent lives are also important values, and the terrorists will have “won” even more decisively if they succeed in destroying cities, the national economy, and possibly, the entire fabric of liberal democracy. Indeed, it should be regarded as instructive that it is not merely the United States but also some of the most civilized European liberal democracies that have evidently found it necessary to sometimes effectively condone or at least acquiesce in the torture of terrorist suspects.⁴⁴

Put differently, so long as the threat of large-scale terrorist attacks against innocents is taken seriously, as it must be, it is neither practicable nor morally persuasive to absolutely prohibit the physical coercion or even outright torture of captured terrorist plotters—undoubtedly evils, but lesser evils than preventable mass murder. In any case, although the torture issue is still debatable today, assuredly the next major attack on the United States—or perhaps Europe—will make it moot. At that point, the only room for practical choice will be between controlled and uncontrolled torture—if we are lucky. Far better, then, to avoid easy rhetoric and think through the issue while we still have the luxury of doing so.

As I have argued, there are three general positions on the problem of torture in the war on terrorism. The first we can call “absolute prohibition”: even in the present circumstances, we must retain and enforce a categorical prohibition against torture. The second we can label (perhaps not too unfairly) “absolute prohibition, except when absolutely necessary”: retain the norm and the laws that torture is categorically prohibited, but expect that the authorities will disregard the law—and *rightfully* disregard the law—if torture is the only means to prevent catastrophic terrorist attacks. The third is “legalize in order to control,” in which the fiction that torture is categorically prohibited is abandoned so that we may create laws, procedures, and institutions to ensure

⁴⁴ Kenneth Roth of Human Rights Watch points out that a number of European governments, including those of Sweden, Germany, Austria, the Netherlands, and the United Kingdom “seem to be toying with emulation” of the United States by becoming “complicit in torture”—for example, by sending terrorist suspects to countries known to torture or, in the case of Britain, refusing “to rule out information extracted from torture in court proceedings.” Roth, “Justifying Torture,” 199–200.

that torture is resorted to only when the evidence—presented *before* the fact—strongly indicates that coercion, and perhaps even torture, is indeed the necessary last resort to prevent mass-murder terrorism.

All of the choices have substantial defects. As I have argued, a categorical prohibition of torture today fails all the important tests: that of national security, that of moral consequences, and (because it has no chance of being observed under certain circumstances) that of practicality, a necessity in any meaningful system of moral constraint. For these reasons, many moral and legal philosophers, as well as political leaders (like John McCain), explicitly or in effect choose the second option: ban coercion but allow for exceptions, after the fact. In essence, this position concedes that in extreme circumstances, torture may be unavoidable, but nonetheless argues that our society would be better off if we continued to act *as if* torture were categorically prohibited. However, this choice also has major defects. First of all, of course, it is clearly hypocritical. As argued earlier, although one can concede that civilized and stable societies must often live with useful hypocrisies, in this case, the price may be too high. Aside from encouraging general cynicism about the rule of law, more particularly we are likely to forfeit our ability to control torture if we do not explicitly recognize it and treat it as a necessary evil under some circumstances.

Put differently, the second option, a compromise between absolute prohibition and control through partial legalization, reflects an empirical judgment as much as or more than a moral norm, for it is premised on the assumption that the fiction of categorical prohibition will lead to less torture, especially less clearly illegitimate torture, than if torture (even in extreme circumstances) were to become “legitimized.” However, the historical record demonstrates that when torture is formally banned in principle but unregulated in practice, it almost always becomes an instrument of governmental police thugs or outright sadists, not only when the end does not justify the means but also when the end itself—such as punishment, intimidation, revenge against political dissidents, or even the amusement of sadists—is unjust.

That the United States is not immune from that danger is already all too clear. Indeed, we could end up with the worst of all worlds: uncontrolled torture that violates every morally necessary constraint, undermines national security by turning the world against us, produces little or no useful information, and precipitates rather than diminishes terrorism. In Iraq, Afghanistan, and probably Guantanamo, the use of torture by American soldiers and intelligence personnel is, from all the evidence now available (and who can doubt that more will be forthcoming), widespread and, indeed, not confined to stopping terrorism. Yet, it appears unlikely that in the end much is going to be done about it, at least at the top of the chain of command. Nor is this new. A convenient amnesia about the Vietnam War has triumphed in the United States; American soldiers engaged in coercion, torture, murder, and other war crimes in Vietnam, and in most cases, little or nothing was done about that either.

This history, past and present, demonstrates that we should not continue to leave the decision on whether to order, condone, or acquiesce in the torture of captured terrorists to unregulated and unaccountable political and military leaders who have already abundantly demonstrated that they are not to be trusted with this terrible power. For these reasons, there is a strong argument for developing laws, institutions, and procedures to authorize, monitor, and control torture, as well as, when necessary, to severely punish unauthorized and illegitimate torture.

To be sure (as I have already discussed), this course also has significant defects: judicial and institutional controls will not always work, imperial presidents may simply disregard the law, and an explicit acknowledgment of torture is likely to harm the image of the United States throughout the world. On the other hand, we have already suffered enormous damage as a consequence of our resort to uncontrolled and unaccountable torture, so it is not unreasonable to expect that an acknowledgment of the problem, accompanied by an honest and sustained effort to fix it as best we can, would make things better. Anyway, the operative question remains: compared to what? Because torture cannot, will not, and, in some catastrophically bad circumstances, should not be banned, on balance a system of controls would seem to best serve this country's national interests as well as have acceptable—or, perhaps better said, least evil—moral consequences.

If this conclusion is accepted, the task becomes to institute controls that are as powerful as we can devise, in order to ensure that torture is resorted to only when there is no other rational or morally defensible choice. We must devise a judicial system that meets three criteria: it must be independent of the government, the armed forces, and the intelligence services; it must be capable of continuous and sustained authorization, observation, and control of torture; and it must have the authority to impose severe criminal sanctions against anyone—no matter at what level of government—who authorizes, engages in, or acquiesces in illegitimate torture. As indicated above, several measures that could meet these criteria have already been proposed, and assuredly more would be forthcoming once a decision in principle was made to move in this direction.

I have argued that there are no good choices in the war on terrorism, only tragic ones. It cannot be denied that any legitimization of torture is a morally painful and historically dangerous step. In some circumstances, though, our only real choice, in terms of both national security and moral consequences, will be between controlled and uncontrolled torture. We gain nothing by pretending differently. In the struggle against deadly terrorism, some of world's most civilized democracies are themselves unwilling to shrink from doing what they think is necessary. Such are the times in which we live.