

Hypothetical Torture in the “War on Terrorism”

Kim Lane Scheppele*

Discussions about torture often start with this hypothetical: Imagine that there is a terrorist in the middle of Manhattan who has planted a nuclear bomb set to go off within hours. You capture him and are faced with a moral dilemma. Do you torture him to get the information that will allow you to defuse the bomb, thereby saving the lives of millions of people? Or do you stand on principle and sacrifice multitudes?¹

* Director of the Program in Law and Public Affairs, and Laurance S. Rockefeller Professor of Public Affairs in the Woodrow Wilson School and the University Center for Human Values, Princeton University; Faculty Fellow, University of Pennsylvania Law School. This article was written while I was the John J. O’Brien Professor of Comparative Law at the University of Pennsylvania Law School and a Fellow in the Law and Public Affairs Program at Princeton University. Earlier versions of this article were presented in a Law and Public Affairs Workshop at Princeton University in January 2005, and at a panel on torture held at the American Enterprise Institute in Washington, D.C. in November 2004. I would like to acknowledge the formative influences of conversations with Marty Lederman, Sandy Levinson, and Serguei Oushakine about this topic, as well as the helpful and specific criticisms of Charles Beitz, Kathleen Clark, Steve Dycus, Seth Kreimer, Stephen Macedo, Jamie Meyerfeld, Philip Pettit, and the engaged participants in the LAPA workshop. I would also like to thank the extraordinary circle of dedicated people who discuss these issues in the “torture list.” It is a constant inspiration to have so many people engaged in a common conversation about these issues, and I have cited their inspirations and sources where they appear throughout the argument. None of my interlocutors would necessarily agree with my arguments in the end, and they bear no responsibility for the directions in which I have gone (or failed to go) with their comments. Given the speed with which the debate moves in this field, I should note that all information was current as of March 2005 when the article was submitted for publication. Developments since that date are not reflected here.

1. The Bush administration has used this hypothetical to indicate that there may be some instances when torture is justifiable. For example, outgoing Homeland Security Secretary Tom Ridge said in an interview with the BBC:

[U]nder an “extreme set” of hypothetical circumstances, such as a nuclear threat, [torture] “could happen.” . . .

. . . “By and large, as a matter of policy we need to state over and over again: we do not condone the use of torture to extract information from terrorists.”

But he said it was “human nature” that torture might be employed in certain exceptional cases when time was very limited.

In the event of something like a nuclear bomb threat “you would try to exhaust every means you could to extract the information to save hundreds and thousands of people,” he said.

US “*Should Not Rule Out Torture*,” BBC NEWS, Jan. 14, 2005, at <http://news.bbc.co.uk/2/hi/americas/4175713.stm>.

Since September 11, 2001, a similar hypothetical has been used very vividly by Alan M.

Put that way, the decision seems easy. Of course, you would torture. Only those completely indifferent to grotesquely bad consequences would not.²

From there, it is a simple proposition to argue that, since you would torture in *that* case, it cannot be true that you would *never* torture, as international law and human rights advocates would have it. And once we have established that there is *some* point at which a trade-off between “lives saved” and “techniques used” is proper, the debate shifts to *how serious* the consequences have to be to justify torture. The hypothetical has wedged us into the position of admitting that torture is sometimes a legitimate tactic. The urgency and immensity of the “war on terrorism” then tend to tip the scales in favor of torture, because the consequences of an undiverted attack can be enormous.

Dershowitz in *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 131 (2002), in a chapter called *Should the Ticking Time Bomb Terrorist Be Tortured?* A variant is used in Jean Bethke Elshtain, *Reflections on the Problem of “Dirty Hands,”* in *TORTURE: A COLLECTION* 77 (Sanford Levinson ed., 2004) [hereinafter *TORTURE*] (nuclear bomb in an elementary school). The hypothetical case is also invoked by Oren Gross, *The Prohibition on Torture and the Limits of the Law,* in *TORTURE, supra*, at 215 n.2 (“a massive bomb somewhere in a bustling shopping mall”), 229. My frequent debating partner on issues of terrorism, Jan Ting, professor of law at Temple University, never fails to bring up this hypothetical as part of his general justification for extreme techniques in the war on terrorism, adding that his Manhattan-resident daughter would have been killed had the 9/11 terrorists chosen a nuclear bomb at the World Trade Center instead of airplanes. Richard Posner uses an only slightly less extreme example: the “terrorist . . . with a suitcase full of aerosolizers filled with smallpox virus.” Richard A. Posner, *Torture, Terrorism, and Interrogation,* in *TORTURE, supra*, at 291, 293.

The hypothetical was well known even before September 11. In discussing whether it would be justifiable to torture, Charles Black used this example: “if an atom bomb were ticking somewhere in the city, and the roads were closed and the trains were not running, and the man who knew where the bomb was hidden sat grinning and silent in a chair at the county police station twenty miles away . . .” Charles L. Black Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights,* *HARPER’S*, Feb. 1961, at 63, 67. In the Argentinian “dirty war,” one of the chief perpetrators, General Albano Jorge Harguindeguy, justified the torture of regime opponents in similar terms:

Suppose, Harguindeguy argued, that a terrorist had placed a bomb in an apartment building and that within ten or twenty minutes the bomb was going to explode, killing the two hundred Argentines residing there. Was torture not then justifiable to determine the bomb’s whereabouts in order to save so many lives?

FRANK GRAZIANO, *DIVINE VIOLENCE: SPECTACLE, PSYCHOSEXUALITY & RADICAL CHRISTIANITY IN THE ARGENTINE “DIRTY WAR”* 28 (1992). I owe these latter two examples to the extraordinary detective work of Seth Kreimer.

For our purposes, what is most crucial about the proliferation of this particular hypothetical is that nearly all of those who use it wind up justifying torture in at least some cases. Charles Black is the only exception I know.

2. Some, like Richard Posner, even consider the absolutist position against torture “irresponsible.” See Posner, *supra* note 1, at 295.

In this article, I want to resist this slide into consequentialism and defend a hard line against the use of torture. I would be willing to mount this defense on moral grounds. I do in fact believe that torture is always and absolutely wrong, given the position we should accord to human dignity, even that of terrorists.³ Terrorism poses a serious threat, but we would lose a great deal more than this war if we sank to the level of the terrorists by sharing their disregard for the rights and dignity of others.

I would also be willing to mount the defense on legal grounds, though this is rougher terrain. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),⁴ to which the United States is a party, admits of no exceptions, even in a state of war or other public emergency.⁵ Nonetheless, the reservations and understandings that the United States attached to this treaty upon ratification may allow the United States, legally speaking, to have a more cramped definition of torture than the rest of the civilized world.⁶ One of those understandings also taints a U.S.

3. Henry Shue’s classic article, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978), provides one persuasive argument against torture, rooted in the observation that someone who could be tortured has to be in a situation in which he is completely dominated by the torturer. In any case where it is likely to occur, torture would run afoul of the general principle that one must never attack the defenseless, even in combat. In a new approach, David Sussman argues that torture is morally wrong because it has special properties not present in other violent action. His general argument proceeds from the observation that torture uniquely “forces its victim into the position of colluding against himself through his own affects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation.” David Sussman, *What’s Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 4 (2005). This allows the author to argue that torture is wrong not only as a form of violence, but also as a form of “forced betrayal,” more like rape. *Id.* Ariel Dorfman’s eloquent account of being haunted by torture committed by his own government testifies to the broader moral context that torture profoundly disrupts and disfigures. Ariel Dorfman, *The Tyranny of Terror*, in TORTURE, *supra* note 1, at 3. Elaine Scarry’s vivid portrayal of the horror of torture also provides strong moral grounds for forbidding it. *See* ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Torture Convention], available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

5. Article 2(2) of the Torture Convention provides, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

6. The reservations, understandings, and declarations that the United States Senate attached to the convention upon ratification are substantial. *See* Resolution of Advice and Consent to the Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17491 (Oct. 27, 1990). They are reproduced at Office of the High Commissioner for Human Rights, *Declarations and Reservations* (as of Apr. 23, 2004), at <http://www.unhchr.ch/html/menu2/6/cat/treaties/>

statute implementing its obligations under the Torture Convention.⁷ But there

convention-reserv.htm. Among the most consequential is this reservation:

¶I(2). That the United States considers itself bound by the obligation under article 16 to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term “cruel, inhuman or degrading treatment or punishment” means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. . . .

The United States also attached these understandings:

¶II(1)(a). That with reference to article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . .

¶II(4). That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty. . . .

In addition, the Senate conditioned its approval of the Convention on this declaration:

¶III(1). That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.

For an account of the United States reservations, understandings, and declarations and their implications for a definition of torture, see Sanford Levinson, *Contemplating Torture: An Introduction*, in *TORTURE*, *supra* note 1, at 23, 29-30.

7. The statute that criminalizes torture, 18 U.S.C.A. §§2340-2340B (West 2000 & Supp. 2005), provides, in part:

§2340. Definitions. As used in this chapter –

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-

can be no serious legal question that “torture,” as such, is prohibited.

There is a serious legal question, however, about what is included within the scope of torture. Torture does not have a clear *legal* meaning, in part because there have been no general and systematic attempts to map the border between “torture” and “not torture.” Why not? One reason may be that, in international human rights instruments, torture is generally twinned with “cruel, inhuman or degrading treatment or punishment.”⁸ And both have generally been subject to an absolute prohibition.⁹ As a result, while some international court judgments have distinguished torture from cruel, inhuman, or degrading treatment, the legal result would have been the same in either case. Both run afoul of the law.¹⁰ The distinction between the two might have

altering substances or other procedures calculated to disrupt profoundly the senses or personality

§2340A. Torture

(a) Offense. Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. . . .

The language defining the prohibited acts in the statute closely tracks the language of the first understanding set out *supra* note 6.

8. The twinning occurs in Article 7 of the International Covenant on Civil and Political Rights, which says, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 172, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. The European Convention on Human Rights uses a similar formulation in its Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. The same twinning appears in the very title of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 4.

9. Article 7 of the International Covenant on Civil and Political Rights, *supra* note 8, and Article 3 of the European Convention on Human Rights, *supra* note 8, both prohibit torture and cruel, inhuman and degrading treatment with the same absolute language. Sandy Levinson declared recently that the wording of the Torture Convention allows some wiggle room to turn cruel, inhuman, or degrading treatment into something other than a non-derogable prohibition. Sanford Levinson, Presentation at the Annual Meeting of the Association of American Law Schools (Jan. 8, 2005). But Claudio Grossman, one of the members of the Committee Against Torture, who was present in the audience when Levinson made his statement, argued forcefully that cruel, inhuman, and degrading treatment is always non-derogable under the Torture Convention. The Committee seems to have taken the position espoused by Grossman. See reports of the states parties and Committee responses at <http://www.unhchr.ch/html/menu2/6/cat/cats.htm>.

10. *See, e.g.,* Republic of Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978), in which the techniques of wall standing, hooding, deprivation of food and water, sleep deprivation, and exposure to loud noise were deemed to be inhuman and degrading treatment, but not torture.

gotten more precise attention if this distinction corresponded to the line between legality and illegality, but such was not the case.¹¹

Yet the United States *did* effectively separate “torture” from “cruel, inhuman or degrading treatment” when it enacted its own domestic torture statute. In 1994, torture practiced “under the color of law” outside the United States was criminalized in American law, but treatment that is cruel, inhuman, or degrading was not criminalized along with torture in the torture statute.¹² If cruel, inhuman and degrading treatment is not explicitly prohibited in the torture statute, however, is such conduct prohibited elsewhere under American law? It is almost surely forbidden when undertaken by U.S. agents inside the United States,¹³ but not so clearly prohibited by U.S. law when undertaken by U.S. agents abroad.¹⁴ The U.S. torture statute, then, undermined an apparently solid consensus in international law condemning highly coercive interrogation, regardless of whether the interrogation methods amounted to full-blown torture or to “merely” cruel, inhuman or degrading treatment. The torture statute’s omission of cruel, inhuman and degrading treatment also allowed the Bush administration after September 11 to draw a close circle around a few practices that would amount to banned torture, while relegating all other forms

The Israeli Supreme Court hesitated to use the term “torture” in conjunction with the practices of shaking, the “Shabach” (a particular stress position), the frog crouch (a different stress position), sleep deprivation, and the excessive tightening of handcuffs, though it found them to be cruel and inhuman methods of interrogation. Public Committee Against Torture in Israel v. Israel, 38 I.L.M. 1471 (1999). In both the British and Israeli cases, however, the practices were deemed unlawful.

11. I owe this line of argument about the twinning of torture with cruel, inhuman, or degrading treatment to Sandy Levinson in his remarks at the Annual Meeting of the Association of American Law Schools, *supra* note 9.

12. Pub. L. No. 103-236, §506(a), 108 Stat. 463 (1994), codified as amended at 18 U.S.C.A. §2340-2340B (West 2000 & Supp. 2005).

13. A U.S. reservation to the Torture Convention indicates that the United States will be bound to the prohibition on cruel, inhuman, or degrading treatment only to the extent that such treatment is barred by American constitutional law under the 5th and 14th Amendment Due Process Clauses and the 8th Amendment “cruel and unusual punishment” standard. *See supra* note 6. As Seth Kreimer has argued, these standards would in fact prohibit much that would otherwise count as cruel, inhuman, or degrading treatment if the actions were conducted inside the United States. Seth Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

14. As the blogposts of Marty Lederman make clear, there may still be some space for U.S. agents to carry out cruel, inhuman, or degrading treatment of detainees abroad (and perhaps even torture full force) if one reads between the lines of the various carefully worded prohibitions in the Bush administration’s public legal rationales. *See* Marty Lederman, *Administration Confirms Its View That CIA May Engage in “Cruel, Inhuman and Degrading” Treatment*, Jan. 12, 2005, at <http://balkin.blogspot.com/2005/01/administration-confirms-its-view-that.html>.

of abusive treatment to the category of “not torture,” which could in fact include cruel, inhuman and degrading treatment.

And what happened to the rest of international law in setting this policy? The Bush administration lawyers made clear in a series of legal opinions that international law would be interpreted narrowly in the “war on terrorism,” if in fact international law is accepted as binding at all.¹⁵ In addition, the extra-territorial application of U.S. law to some of the most pressing cases involving highly coercive interrogation practices has been stymied by debates over highly technical issues about precisely who holds formal custody of a detainee and who controls the territory where the coercion occurs.¹⁶ Such discussions, although crucially important, are likely to be comprehensible only to legal specialists, and they surely complicate the bright-line reasoning of human rights advocates. The current *policy* debate over the acceptability of torture needs to turn on something other than whether torture “shelters” can be legally constructed and whether government lawyers have taken proper advantage of the loopholes that American law has to offer in creating them. Given the way that the American law on torture was written in the first place and the way that Bush administration lawyers have interpreted both its commitments under international law and the extraterritorial application of American law, the absolute *legal* prohibition on both torture and on cruel, inhuman and degrading treatment has fallen victim to hopelessly technical hairsplitting. These debates have become inaccessible to the general public as the U.S. “war on terrorism” has played itself out on a world-wide field.

Regardless of the Bush administration’s legal rationalizations, however, the U.S. general public has already generated substantial moral resistance to the global interrogation policy as leaks revealing the nature of these interrogations have proliferated. A USA Today poll in January 2005 indicated that large majorities of Americans were not only unwilling to tolerate torture but were also unwilling to tolerate the precise techniques legally justified and

15. In a memo written by John Yoo and Robert J. Delahunty, then in the Office of Legal Counsel, international law was deemed to be an entirely optional constraint on presidential action: “International law is nowhere mentioned in the Constitution as an independent source of federal law or as a constraint on the political branches of government.” Memorandum from John Yoo & Robert J. Delahunty to William Haynes II, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002 [hereinafter Yoo Memo], at 35, available at http://pegc.no-ip.info/archive/DOJ/20020109_yoomemo.pdf.

16. On these issues, Marty Lederman has performed heroic legal analysis in taking apart the claims of the Bush administration. See Marty Lederman, *Understanding the OLC Torture Memos*, Jan. 7, 2005, at <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-1.html>, <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part.html>, http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part_07.html, and <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-coda.html>.

openly used by the United States in its “war on terrorism” – techniques that the U.S. has asserted are not torture.¹⁷ Since it is always open to an administration to behave more decently than the law allows, an argument outside the technical confines of the law may persuade more readily in the current context, especially with public opinion behind it.

In this article, I will therefore mount an argument against torture not on moral or legal grounds, but instead on *sociological* grounds. A sociological approach to moral and legal questions tries to understand the shape of the actual situation in which a moral agent finds herself, in order to get the best possible account of the complexity and nuance of the context within which choices have to be made. A sociological approach inquires into whether distinctions drawn in abstract moral or legal debate track the actual contexts of decisions when hard choices have to be made “on the ground.”

By arguing from sociology, I can address the question: *Are coercive interrogation techniques in fact being used in the sorts of situations that have been invoked hypothetically to persuade people that such techniques are necessary?* I will show that the actual use of coercive interrogation in the war on terrorism does not track the ticking time bomb hypothetical in its crucial details. Agreeing with the hypothetical, then, does not commit anyone to agreeing with the actual uses of coercive interrogations in the present fight against terrorism.

17. The poll reports that 59% of respondents said they would *not* approve the U.S. government’s torturing of *known terrorists*, even if those known terrorists “know details about future terrorist attacks in the U.S.” and the government thinks such torture is “necessary to combat terrorism.” *USA Today/CNN/Gallup Poll Results*, Jan. 12, 2005 (from a survey of 1,008 American adults conducted between January 7-9, 2005), available at <http://www.usatoday.com/news/polls/tables/live/2005-01-10-poll.htm>. On the other hand, 65% of those surveyed thought it would be acceptable for the U.S. government to “assassinate known terrorists.” *Id.* Specific interrogation techniques were also put before those surveyed, with the following results:

<i>Interrogation Technique</i>	<i>% who thought it would be wrong</i>
Forcing prisoners to remain naked and chained in uncomfortable positions in cold rooms for several hours	79%
Having female interrogators make physical contact with Muslim men during religious observances that prohibit such contact	85%
Threatening to transfer prisoners to a country known for using torture	62%
Threatening prisoners with dogs	69%
Strapping prisoners on boards and forcing their heads underwater until they think they are drowning	82%
Depriving prisoners of sleep for several days	48%

Id.

The normative force that seems to emanate from the hypothetical case of the nuclear terrorist cannot be invoked as a justification for an actual policy to engage in torture and other abusive interrogation if the hypothetical does not track the real-world problems. To demonstrate this, I will deconstruct the nuclear terrorist hypothetical that has convinced so many that torture is thinkable. Hiding behind this hypothetical is an implicit consequentialist argument that torture would be justified if the consequences of *not* torturing were serious enough. Torturing one person to save thousands – even hundreds or perhaps only two people – appears justifiable if the balance of consequences in terms of lives saved, taken alone, determines the moral acceptability of a course of action. But the hypothetical involves more than a simple balancing of lives. It makes a series of flawed assumptions about what the potential torturer would know and what torture could accomplish. These assumptions are crucial to assessing whether torture would have the promised consequences. Deconstructing these assumptions and comparing them in a hard-nosed way to what we know about real decisions to engage in coercive interrogation allows us to judge whether the decisions are justified by the moral argument implicit in the hypothetical.

Why challenge the hypothetical? Hypotheticals are often used to frame a complicated moral question in a way that makes it easy to grasp. But if hypotheticals are to have the moral force that they are intended to generate, they must provide usable intuitions that are transferable to real-world decisions. The value of hypotheticals depends on the extent to which they track the critical features of the problem that a moral agent actually faces. To argue from a case that does *not* track the critical moral features of the relevant context disorients both the moral and the legal issues that the hypothetical is designed to illuminate. Taking apart the hypothetical allows us to see more precisely why it is a mistake to use an extreme and imaginary case to develop policy. As I will show, the decision to torture will never, in the end, be simply a judgment about how many lives will be saved if torture is used.

What, then, are the sociological problems with the hypothetical? They go to its very core. First, the hypothetical assumes that you (as the moral agent to whom the hypothetical is directed) and the terrorist are *alone in the world*. It is just you and him¹⁸ against all of Manhattan (and against the whole world),

18. I am using the male pronoun in the analysis here not out of unreflective sexism, but because the vast majority of Islamist terrorists are men. Using a gender-neutral pronoun would disguise this element of the real world within which these decisions are made. In a few cases, women have been involved in terrorist attacks – for example, the “black widows,” who have been involved in hostage-taking and bombings on behalf of Chechen independence, and women suicide bombers used by Palestinian terrorist groups against Israel. But it seems significant that women show up as terrorists in struggles over occupation and independence, and not in the more

with a decision invoking your personal morality on your lonely shoulders. There is no institutional context; neither state nor society appears in this picture. But of course in any real-world context, the choice would be made in an institutional setting by those charged with the responsibility to fight terrorism. The question, therefore, is not whether “you” as an individual should torture, but instead whether a *nation* should have a *policy* approving the use of torture – a very different moral matter. As a result, the question should be framed not as a matter of personal choice, but instead as a decision made by a professional interrogator who is following institutional rules.

Second, the hypothetical assumes an extraordinary degree of clarity about the situation in which you (now an institutional “you”) find yourself when the question of whether to torture arises. You know *with reasonable certainty* both that there *is* a nuclear bomb in the middle of Manhattan and that the bomb *will explode* and *will kill many people* absent your intervention. Such certainty may be hypothetically possible, but it will likely never exist. Instead, it is far more likely that you will wonder *whether* there is a bomb in the first place and, if there is, *how dangerous it might be*.

Third, the hypothetical assumes that the person to be tortured is *the one* (perhaps even the *only one*) who knows where the ticking bomb is. The “war on terrorism” being what it is, however, it is highly unlikely that any person faced with the decision to torture will know whether the suspect either has the relevant information or provides the only or the best avenue through which to get the information. Instead, the more likely question will be whether the person to be tortured really knows anything useful at all.

Finally, the hypothetical assumes that if the captured person gives you the information after being tortured, the information will in fact be *true* and *useful* in defusing the bomb. Yet torture produces results that are highly unreliable.

I will challenge each of the elements of the hypothetical in turn, because in the real-world situations in which the use of torture is being considered today, *none* of the elements that make the hypothetical so persistently persuasive is present, except the hypothetical balancing of lives. I am going to argue that the farther away we get from the hypothetical in a real-world situation, the more reluctant we should be to condone torture, or even to entertain the possibility of it. Even if the hypothetical persuades us that torture would be justified in some extreme cases where many lives would be saved by immediate action, the anti-terrorism campaign has not yet and most likely never will present such a case. As a result, I will argue, the pitched debate

general forms of Islamist terrorism, from which women seem to be excluded as a matter of principle. Thus, while it is not impossible that women would be terrorists, it is not very likely in the form of terrorism that is the primary target in the U.S. global “war on terrorism.”

over this hypothetical and its logical entailments obscures rather than identifies what the real choices are in the present situation. We should look instead at the position in which the United States actually finds itself and assess the arguments for and against torture against this background. The arguments for torture, I submit, are not convincing in the real world, however compelling they may appear in the imagined world of the torture hypothetical.

I. THE NEW TORTURE DEBATE: OPENING PANDORA’S BOX

In June 2004, news leaked about a secret memo from August 2002 concerning the legality of torture,¹⁹ a memo written in the Justice Department’s Office of Legal Counsel (OLC).²⁰ The Bybee Memo (for the head of the OLC at the time, Assistant Attorney General Jay S. Bybee)²¹ saw the light of day only after the abuses of Iraqi detainees in American custody at the Abu Ghraib prison in Iraq were revealed. The memo argued that “torture” as a legal category included such a narrow range of cases as hardly to exist in any practical context short of the death of a person subjected to abuse:

[W]e conclude that torture . . . covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm Because the acts inflicting torture are extreme, there is [a] significant range of

19. See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A01.

20. The Office of Legal Counsel is a highly respected office within the Justice Department that provides legal advice to the President specifically and to the executive branch of the U.S. federal government more generally. Its opinions are considered highly authoritative and are often relied upon heavily in decisions on crucial policy matters. For more, see the OLC’s Web site at <http://www.usdoj.gov/olc/>.

21. Memorandum from Jay S. Bybee, Asst. Attorney General, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §2340-2340A*, Aug. 1, 2002 [hereinafter Bybee Memo], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>, reprinted in MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 115 (2004) [hereinafter DANNER]. Actual authorship of this memo is widely attributed to John Yoo. See, e.g., R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees; Justice Nominee’s Hearings Likely to Focus on Interrogation Practices*, WASH. POST, Jan. 5, 2005, at A01; see also Letter from John C. Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html>, reprinted in DANNER, *supra*, at 108.

acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.²²

Moreover, the memo argued, Congress may have exceeded its constitutional authority by passing the torture statute in the first place, since it could be construed as improperly limiting the President's Commander-in-Chief powers to run the war any way he sees fit.²³ As long as the President detains and interrogates "enemy combatants" pursuant to his constitutional authority as Commander in Chief, the memo asserted, statutes limiting the President's power to conduct the interrogations in any manner he deems appropriate would raise "serious constitutional questions."²⁴ Moreover, even assuming that the statute were constitutional, the memo proposed that those who might be prosecuted for torture could avail themselves of the defenses of necessity and self defense.²⁵ The memo thus provided legal advice to the executive branch on what torture was and on the legal limits by which the executive branch was bound. The memo first defined torture as a vanishingly small set of behaviors, and then offered a variety of legal arguments to permit the President and his agents to evade the torture statute's prohibitions in any event.

By defining torture so narrowly, the memo gave its legal stamp of approval to a range of interrogation techniques that seem to many to be torture. It appeared to approve the use of "torture lite," a range of acts that cause serious pain and suffering but that do not rise to the extreme levels required for torture by the memo's tortured analysis.²⁶ Thus, the secret memo largely swept away both domestic and international law constraining what the President of the United States could do to gather information in the war on terrorism.

The critical reaction to the leaked Bybee Memo was immediate and intense. Legal experts, foreign leaders, and journalists rose in chorus to condemn the apparent approval of torture.²⁷ At first the Bush administration

22. Bybee Memo, *supra* note 21, at 46 (DANNER at 155).

23. *Id.* at 31-39 (DANNER at 142-149).

24. *Id.* at 35 (DANNER at 145). The analysis continued, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield." *Id.* (DANNER at 145-146).

25. *Id.* at 39-46 (DANNER at 149-155).

26. See generally Seth F. Kreimer, "Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience, 1 J. NAT'L SECURITY L. & POL'Y 187 (2005).

27. See David G. Savage & Richard B. Schmitt, *Lawyers Ascribed Broad Power to Bush on Torture*, L.A. TIMES, June 10, 2004, at A16 ("A broad range of legal experts, including specialists in military law, say they were taken aback by this bald assertion of presidential supremacy."); Richard Norton-Taylor, *A Torturer's Charter: Secret Documents Show That U.S. Interrogators Are Above the Law*, GUARDIAN, June 12, 2004, at 23 ("The document, on the face

tried to neutralize the memo by having the President state that all U.S. interrogators were required to “follow the law.”²⁸ Given that the OLC’s understanding of “the law,” as reflected in the Bybee Memo, did not rule out much, the Administration was eventually pushed into repudiating the memo, calling parts of it “overbroad and irrelevant.”²⁹ Shortly thereafter, the CIA, which had apparently been guided by the memo, announced that it was suspending its use of harsh interrogation techniques.³⁰

A new OLC memo, prepared for Deputy Attorney General James B. Comey and issued on December 30, 2004, clearly backs off from some of the extreme positions taken in the earlier memo.³¹ As the new memo points out in its opening sentence, “Torture is abhorrent both to American law and values, and to international norms.”³² The new memo acknowledges, among other things, that causing physical suffering even without severe pain may rise to the level of torture,³³ and that prolonged mental harm may produce a very wide range of later effects.³⁴ The less dogmatic tone of the new memo can be seen in the repeated invocation of examples that illustrate the impossibility of listing in advance specific interrogation techniques that will rise to the level of torture.³⁵ It also focuses the attention of interrogators on the overall impact of the interrogation techniques on the person being questioned, rather than, as before, allowing interrogators to seek legal immunity in a pre-approved

of it, is a charter allowing the US president to abuse human rights and ignore domestic as well as international law.”); Dana Milbank & Dana Priest, *Bush: U.S. Expected To Follow Law on Prisoners: President Is Pressed on Interrogations Memo*, WASH. POST, June 11, 2004, at A06 (“[T]he administration’s view on prisoner interrogation was criticized by French President Jacques Chirac, who has been a constant irritant to Bush. ‘Yes, we should fight terrorism, but we should not forget the principles on which our civilization rests, such as human rights,’ Chirac said in a news conference.”).

28. See Milbank & Priest, *supra* note 27.

29. See Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A01.

30. See Dana Priest, *CIA Puts Harsh Tactics on Hold: Memo on Methods of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at A01.

31. Memorandum from Daniel Levin, Acting Asst. Attorney General, to James B. Comey, Deputy Attorney General, *Legal Standards Applicable under 18 U.S.C. §2340-2340A*, Dec. 30, 2004 [hereinafter *Comey Memo*], available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

32. *Id.* at 1.

33. *Id.* at 12.

34. *Id.* at 14-15. The effects include suffering years later from flashbacks, nightmares, anxiety, and disruption of sleep.

35. For example, torture is not limited to historical techniques associated with the term. *Id.* at 5 n.13. The *Comey Memo* emphasizes that there is no objective way to define severe pain, which must therefore always have a subjective element. *Id.* at 8 n.18. Post-traumatic stress disorder and years of suffering from flashbacks, nightmares, anxiety, and disruption of sleep are said to qualify as prolonged mental harm under the torture statute. *Id.* at 14 n.25, 15.

checklist of techniques without concern for their individual or cumulative effects. The new memo also states that the controversial earlier claim of out-sized powers for the President was “unnecessary.”³⁶

Even before the stunning repudiation of the earlier Bybee Memo, however, no one in a position of authority had argued that torture was of no moment or that it should generally be allowed.³⁷ Moreover, while the Torture Convention is enforced in the United States case primarily by reporting requirements,³⁸ the

36. *Id.* at 2.

37. President George W. Bush has contributed to the glorious rhetoric against torture: “Freedom from torture is an inalienable human right” Statement on United Nations International Day in Support of Victims of Torture, 40 WEEKLY COMP. PRES. DOC. 1167 (July 5, 2004). “Torture is an affront to human dignity everywhere.” Statement on United Nations International Day in Support of Victims of Torture, 39 WEEKLY COMP. PRES. DOC. 824 (June 30, 2003). Even Alan Dershowitz, who is routinely portrayed as advocating torture in his book *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002), has said in a later response to his critics, “I am against torture as a normative matter, and I would like to see its use minimized.” Alan Dershowitz, *Tortured Reasoning*, in *TORTURE*, *supra* note 1, at 266.

38. This statement assumes that judicial enforcement is avoided by the United States “declaration” upon ratification that Articles 1-16 of the Torture Convention are non-self-executing. See *supra* note 6. As to the efficacy of such declarations, see Malvina Halberstam, *Alvarez-Machain II: The Supreme Court’s Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT’L SECURITY L. & POL’Y 89 (2005). The reporting requirements are found in Articles 17-24 of the Torture Convention.

Under the Clinton administration, the United States seemed to have taken these requirements seriously. The *Initial Report of the United States to the U.N. Committee Against Torture, Submitted by the United States of America to the Committee Against Torture*, Oct. 15, 1999, available at http://www.state.gov/www/global/human_rights/torture_toc99.html, is highly self-reflective and detailed, and it clearly reflects a willingness to contemplate a much broader definition of torture than the Bush administration’s lawyers have advanced. The original report was, however, submitted five years late. For the concluding comments of the Committee Against Torture, including a chastisement for the United States late submission, see [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.55.44.paras.175-180.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.44.paras.175-180.En?OpenDocument). The Committee set a deadline for the United States to submit its second report at November 19, 2001. But as of March 2005, there was no record in the sessions of the Committee that any subsequent U.S. report has been filed. See <http://www.unhchr.ch/html/menu2/6/cat/cats.htm>. [The second report was filed eventually in May 2005, too late for incorporation into this article. See [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/1d2156b20a7c8f7ec125708300332cb8/\\$FILE/G0542590.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/1d2156b20a7c8f7ec125708300332cb8/$FILE/G0542590.pdf)].

Article 22 of the Convention allows individual states to grant jurisdiction to the Committee to adjudicate individual complaints. There is a substantial jurisprudence of the Committee, available at <http://www1.umn.edu/humanrts/cat/decisions/cat-decisions.html>. Not surprisingly, however, the United States has not consented to this jurisdiction of the Committee. The United States has recognized the competence of the Committee, pursuant to Article 21 of the Torture Convention, to receive and consider complaints filed by other states parties to the Convention

enactment of a federal criminal law based on the Convention apparently sets up domestic criminal sanctions for torture committed abroad.³⁹ Torture, then, always was and still is illegal; the content of the legal idea of torture, however, shifted dramatically after 9/11.

Interrogation practices also appear to have shifted dramatically after 9/11, one might guess in response to the changing legal standards promoted within the Bush administration. Despite the official U.S. repudiation of torture, the United States appears to be using a variety of highly coercive practices to force information from many of its thousands of detainees around the world. As the memos from Washington defined torture away and provided a variety of legal rationales to permit coercive interrogations, events on the ground seem to bear out that restrictions on torture and torture-like tactics had in fact been loosened. The disclosure of detainee mistreatment in photographs from the Abu Ghraib prison in 2004⁴⁰ ignited a heated debate over whether the abuses shown were the result of U.S. policy (as those who read the Bybee Memo suspected) or were the actions of a few “bad apples” (as the Bush administration insisted).⁴¹

who have made themselves subject to such complaints.

39. 18 U.S.C.A. §2340-2340B (West 2000 & Supp. 2005). Note, however, that John Yoo, then with the Office of Legal Counsel, opined in a letter to Alberto Gonzales, then counsel to President Bush, that the United States could not be bound by a broader definition of torture than that explicitly incorporated into U.S. federal law, because the United States had conditioned its ratification of the Torture Convention on an understanding that included such a cramped definition. Letter from John C. Yoo, *supra* note 21. The understanding is set out *supra* note 6. The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, requires that a treaty reservation not be incompatible with the object and purpose of the treaty itself, *id.* art. 19(c). Yoo interpreted this provision narrowly by arguing that the U.S. understanding was consistent with the object and purpose of the Torture Convention as long as the United States has not “reserved the right to conduct torture.” Letter from John C. Yoo, *supra* note 21, at 4. And that, at least, the United States did not do.

My colleague Seth Kreimer has persuasively argued that, even independently of the explicit criminal prohibition, the use of torture would run afoul of the Constitution in multiple ways. Kreimer, *supra* note 13.

40. Some of the photographs are reprinted in DANNER, *supra* note 21, at 217-224.

41. Those directly pictured in the abuses at Abu Ghraib have been prosecuted *as if* they were merely “bad apples.” When the soldiers charged with abuse have tried to raise the defense that they were ordered to do the things shown in the infamous photographs, the “following-orders” defense has been excluded in their courts martial. For example, “Specialist [Charles] Graner’s lawyer, Guy Womack, repeated the assertion he made throughout the trial that the military was making his client the fall guy for higher-ranking military intelligence soldiers, several of whom have been implicated in a Pentagon investigation, but not charged.” Kate Zernike, *Ringleader in Iraqi Prison Abuse Is Sentenced to 10 Years*, N.Y. TIMES, Jan. 16, 2005,

Subsequent disclosures, however, have revealed that Abu Ghraib was not an isolated location with unique problems. Detainees in American custody in Guantánamo, in Afghanistan, and in many locations in Iraq have been beaten, menaced by dogs, threatened with infliction of pain, subjected to prolonged periods of solitary confinement, deprived of sleep, subjected to sexual humiliation, exposed to extremes of heat and cold, shackled in painful positions for many hours, and bombarded with bright lights and loud music for extended periods.⁴² A number of detainees have been subjected to many, perhaps even all, of these techniques over weeks and months of interrogation.⁴³

The similarity of techniques across different branches of the U.S. military and across different types of American detention centers strongly suggests that it is official policy more than the quirks of individual soldiers that is driving the shocking treatment of detainees,⁴⁴ although the Bush administration has

at 12. As Graner's lawyer argued:

"People have talked about this case as being like a Nuremberg trial," he said, referring to the prosecution of high-ranking Nazis who tried to defend their actions by saying they had followed orders. "There's a difference. In Nuremberg it was generals we were going after. We didn't grab sacrificial E-4s, we were going after the order-givers. Here we're going after the order-takers."

Id.

42. See the extensive documentation of abuses in Kreimer, *supra* note 26.

43. *The New York Times* reported, for example, that Mohamed al-Khatani, who is being detained at Guantánamo, was given a tranquilizer, put into a sensory deprivation suit, then flown in a plane for hours to make him believe that he was being taken to Egypt, where interrogators famously torture their captives. In fact, al-Khatani was brought back to Guantánamo, where U.S. interrogators participated in the fiction that they were in the Egyptian security services. The published account does not say what U.S. interrogators then specifically did to al-Khatani, except that they employed "harsh methods," presumably including some that could only be used with Secretary of Defense Rumsfeld's approval. The *Times* story does indicate, however, that al-Khatani was subjected to a forced enema to deal with "dehydration" that had resulted from his long interrogation sessions. Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11. "False flag" methods of interrogation, in which American interrogators pretend they are from a country that uses torture, were explicitly approved by Donald Rumsfeld in April 2003. Memorandum from Donald Rumsfeld, Sec. of Defense, to Commander, U.S. Southern Command, *Counter-Resistance Techniques in the War on Terrorism*, Apr. 16, 2003, available at <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf>, reprinted in DANNER, *supra* note 21, at 199.

44. According to one account:

What's notable about the incidents of torture and abuse is first, their common features, and second, their geographical reach. No one has any reason to believe any longer that these incidents were restricted to one prison near Baghdad. They were everywhere: from Guantánamo Bay to Afghanistan, Baghdad, Basra, Ramadi and Tikrit and, for all we know, in any number of hidden jails affecting "ghost detainees" kept from the purview of the Red Cross. They were committed by the Marines, the Army, the Military Police, Navy Seals, reservists, Special Forces and on and on. The

repeatedly denied this. With the publication of a series of memos from the Defense Department, permitting, then withdrawing, and then again permitting (with individualized approval) certain harsh techniques of interrogation,⁴⁵ however, the fact that harsh interrogation techniques have been and probably still are being used by military personnel is no longer in doubt.⁴⁶

use of hooding was ubiquitous; the same goes for forced nudity, sexual humiliation and brutal beatings; there are examples of rape and electric shocks. Many of the abuses seem specifically tailored to humiliate Arabs and Muslims, where horror at being exposed in public is a deep cultural artifact.

Andrew Sullivan, *Atrocities in Plain Sight*, N.Y. TIMES, Jan. 23, 2005, §7 (Book Review), at 1.

45. Many of the memos, reports, and legal rationales are published in DANNER, *supra* note 21. Others are available at <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html>. An extensive collection, including a number of memos not available elsewhere, can be found in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

46. The questioning of these practices does not come from human rights activists only. Even within the military and intelligence communities there have been conflicts over how far interrogation techniques can be pushed before one or another of the institutions involved pulls out of the interrogations.

The FBI objected to techniques used by the military at Guantánamo, including beating detainees, shackling them by short chains to the floor for extended periods, during which they defecated on themselves, and draping the detainees with Israeli flags. See Carol D. Leonnig, *Further Detainee Abuse Alleged: Guantánamo Prison Cited in FBI Memos*, WASH. POST, Dec. 26, 2004, at A01.

One FBI email includes this passage:

I saw [a] detainee sitting on the floor of the interview room with an Israeli flag draped around him, loud music being played and a strobe light flashing. I left the monitoring room immediately after seeing this activity. I did not see any other persons inside the interview room with the Israeli flag draped detainee, but suspect that this was a practice used by DOD DHS

Email from Redacted to Redacted, available at http://www.aclu.org/torturefoia/released/FBI.121504.4737_4738.pdf. Another email that circulated within the FBI about military interrogation tactics at Guantánamo includes this account:

Here is a brief summary of what I observed at GTMO. On a couple of occasions, I entered interview rooms to find a detainee chained hand [and] foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves and had been left there for 18-24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. . . . On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. . . .

Email from Redacted to Redacted, available at <http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf>. In still another email, an FBI agent was clearly disturbed by the fact that the military interrogators had told the detainees that they were FBI personnel (crucial bits of the

Other leaks indicate that the CIA may have employed additional and even harsher techniques that it alone had been cleared to use, such as “water boarding,” a procedure that not only causes a person to believe that he is drowning but in fact will drown someone if the procedure is not interrupted before it achieves its fatal effects.⁴⁷ The CIA also seems to be using extraordinary renditions, or transfers of persons from country to country, to take advantage of more coercive interrogation techniques employed by the

account were redacted before public release):

Of concern, DOD interrogators impersonating Supervisory Special Agents of the FBI told a detainee that REDACTED. These same interrogation teams then REDACTED. The detainee was also told by this interrogation team REDACTED. These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee. If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done [by] the “FBI” interrogators. The FBI will be left holding the bag before the public.

E-mail from Redacted to Gary Bald, Frankie Battle & Arthur Cummings, *Re: FWD: Impersonating FBI at GTMO*, at <http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf>.

The CIA pulled its agents out of some military interrogations, as well:

Concerns about harsh techniques used by Special Operations forces prompted the Central Intelligence Agency last year to bar its officers in Iraq from taking part in military interrogations where prisoners were subjected to duress, intelligence officials said.

A classified directive issued by the agency’s headquarters on Aug. 8, 2003, to all its personnel in Iraq advised that “if the military employed any type of techniques beyond questions and answers, we should not participate and should not be present,” according to an account provided by a senior intelligence official.

In telling CIA personnel to keep away from interrogations where military personnel were using harsh techniques, the directive was more restrictive than was previously known. Officials first disclosed the agency’s order last September, saying that it had barred CIA officers from interviewing the military’s prisoners unless military officials were present.

The new disclosure is the latest sign of longstanding unease in intelligence circles about the military’s interrogation techniques in Iraq. Complaints by the Defense Intelligence Agency about the rough treatment of prisoners by the same Special Operations units were made public last week in a document disclosed by the American Civil Liberties Union.

Douglas Jehl, *C.I.A. Order on Detainees Shows Its Role Was Curbed*, N.Y. TIMES, Dec. 14, 2004, at A15.

47. See James Risen, David Johnston & Neil A. Lewis, *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1. It is unclear how many of these practices were affected by the CIA’s decision to stand down its most aggressive interrogation techniques after the Bybee Memo was repudiated by the Bush administration. See Priest, *supra* note 30.

destination countries.⁴⁸ In addition, the CIA is widely thought to be running its own secret detention and interrogation centers around the world in what has been called a “gulag” of secret jails.⁴⁹ And what will the United States eventually do with those who have been squeezed dry of information using methods that produce evidence unlikely to be admissible in any rights-respecting court? The intelligence community reportedly has proposed the establishment of long-term detention centers, where already-interrogated detainees can be kept indefinitely without the need for charges, trials, or convictions.⁵⁰

The debate over torture has opened a Pandora’s box. One set of controversies flying out of the Pandora’s box has to do with how torture is defined in law. The legal debate over coercive interrogation – including the bulk of the two OLC memos on torture – has focused primarily on whether the

48. In these transfers, a CIA plane is reportedly used to take detainees to U.S.-friendly countries where torture is practiced and where one suspects that interrogation techniques can be used that are not permitted in formal American policy. “Since Sept. 11, 2001, secret renditions have become a principal weapon in the CIA’s arsenal against suspected al Qaeda terrorists, according to congressional testimony by CIA officials. But as the practice has grown, the agency has had significantly more difficulty keeping it secret.” Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST, Dec. 27, 2004, at A01. For a thorough review of all the publicly known cases, see Jane Mayer, *Outsourcing Torture; The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106.

49. According to one news account:

The United States government, in conjunction with key allies, is running an “invisible” network of prisons and detention centres into which thousands of suspects have disappeared without trace since the “war on terror” began.

In the past three years, thousands of alleged militants have been transferred around the world by American, Arab and Far Eastern security services, often in secret operations that by-pass extradition laws. The astonishing traffic has seen many, including British citizens, sent from the West to countries where they can be tortured to extract information. Anything learnt is passed on to the US and, in some cases, reaches British intelligence. . . .

The practice of “renditions” – when suspects are handed directly into the custody of another state without due process – has sparked particular anger. At least 70 such transfers have occurred, according to CIA sources. Many involve men who have been freed by the courts and are thus legally innocent. Renditions are often used when American interrogators believe that harsh treatment – banned in their own country – would produce results.

Jason Burke, *Secret World of US Jails*, (SUNDAY) OBSERVER, June 13, 2004, available at <http://www.guardian.co.uk/alqaida/story/0,12469,1237650,00.html>.

50. “The Pentagon and the CIA have asked the White House to decide on a more permanent approach for potentially lifetime detentions, including for hundreds of people now in military and CIA custody whom the government does not have enough evidence to charge in courts.” Dana Priest, *Long-Term Plan Sought for Terror Suspects*, WASH. POST, Jan. 2, 2005, at A01.

techniques that might be authorized for use by U.S. agents are torture or whether they “merely” constitute cruel, inhuman, or degrading treatment. If the latter, there is a further debate about whether American law bans such practices or whether they are perfectly legitimate tactics to be used against recalcitrant detainees who might possess crucial information. The Bush administration has tried to close the box on the legal debate with the response that the United States does not use torture. End of discussion. But while President Bush declares his objection to torture on ritual occasions, the actual practices of the United States might well amount to torture on a less tortured understanding of the term.

Another set of controversies flying out of the Pandora’s box highlights the unusual nature of the “war on terrorism” and the unique threat posed by terrorists willing to die for their cause. Because of the special nature of the present threat, according to the Administration and its supporters, there will be extreme cases in which interrogators will be *tempted* to use extreme interrogation methods, regardless of the legal status of such techniques. Thus, some argue, we should acknowledge the inevitable and find some way to regulate how far the interrogators can go down this path, rather than sticking to principle and refusing to budge from the absolutist approach against extreme coercion.⁵¹ Such justifications tip the balance toward “torture with permission.” This approach would allow some harsh interrogation techniques to be used with special permission in special cases. The rationale here is purely utilitarian, as it would permit torture to be used as an exception to a general rule banning its practice.

These two debates operate like a one-two punch on a principled stand against torture. First, the law is softened up, as a clear, non-derogable ban turns into a complicated set of technical distinctions. Then, the inevitability of torture is raised, appealing to an audience’s rule-of-law instincts to regulate the inevitable rather than to let it go unchecked. In the meantime, the pattern of abuses around the world in U.S.-controlled detention sites makes it clear that the Washington memos were not just talking points, but had some real-world effects on actual interrogations. The reduction of moral outrage to technical debates over what the law strictly requires and how to minimize inevitable abuses of policy has made it hard to see where the evidence points. Too many sources – not only former detainees, but the Red Cross, military leaks, FBI emails, and internal memos of the Bush administration itself –

51. Alan Dershowitz was the first and loudest in making this argument. See Dershowitz, *supra* note 1, at 131-164; Dershowitz, *Tortured Reasoning*, *supra* note 37, at 266 (arguing that torture is in fact being used in the war on terrorism, and that it is better for the rule of law to have such practices inside rather than outside the legal system).

support the claim that torture and torture-like interrogation methods are in widespread use by the United States in the “war on terrorism.”

It is against this background that the nuclear hypothetical has performed its most significant work. The use of an extreme hypothetical that emphasizes catastrophic loss appears to justify torture in general (or at least “torture with permission”), and it may prepare the ground for formal legal recognition of methods of coercive interrogation, either as official policy or as an exception to normal standards.⁵² The extreme hypothetical of the nuclear terrorist is put forward as illustrating the sort of extraordinary situation in which we presently find ourselves and in which we must be willing to contemplate torture or face the slaughter of innocents. Given that virtually all of those who believe that torture is sometimes necessary or inevitable use variants on this same hypothetical – the nuclear bomb in a major city⁵³ – there is something important and worth investigating about the hypothetical itself.

II. UNPACKING THE TORTURE HYPOTHETICAL

To start, it helps to ask: What is the real situation in which torture is being contemplated? Let us assume that an American interrogator participating in the global “war on terrorism” is faced with the decision whether to torture a detainee for information about future terrorist attacks. In this specific context, there are four particular ways in which the torture hypothetical deviates from any conceivable real-world situation.

Bureaucracy. The hypothetical assumes that the interrogator is making an individual decision as an independent moral agent. But in reality, the interrogator is following rules about when torture may be permitted – rules of a *bureaucracy* in which the interrogator is in a subordinate position, following established procedures. The real-world question that arises is not whether you or I would torture the Manhattan nuclear terrorist personally, but instead whether we can design rules for agents in complex organizations (like the military or intelligence communities) that would in fact limit torture to situations like this hypothetical, where we might agree as a political community that torture would be warranted. The decision to torture is wrongly presented in the hypothetical as a personal moral choice, when the actual decision would in fact be a political judgment about standard operating procedures for a bureaucracy.

52. Alan Dershowitz proposes, for example, to employ “torture warrants,” in which a judge would be empowered to give special permission for interrogators to torture specific detainees under controlled circumstances. Dershowitz, *Tortured Reasoning*, *supra* note 37, at 266-267.

53. Some of the variants are described *supra* note 1.

Momentous, Imminent, and Certain Catastrophe. The judgment to torture will almost surely be made in a context where the facts are not as clear as those posited in the hypothetical. Interrogators will almost never be *certain* that the threat to be averted is both as *monumental* and as *imminent* as the hypothetical suggests. Monumental but not imminent consequences or imminent but not monumental consequences do not present as compelling a case for torture as the hypothetical does. Less than reasonable certainty on either point diminishes the pull toward torture. The situation in which torture might be justifiable has to pose both immediate and immense consequences, just as the hypothetical does. The interrogator has to be certain, or very nearly so, that the consequences are both immediate and immense. While the “war on terrorism” surely poses a generalized, pervasive, and serious threat, interrogators will virtually never be in the circumstance of confronting a particularized, certain, monumental, and imminent threat. But generalized, pervasive, and serious threats are not the ones covered by the hypothetical.

Identity. The hypothetical stipulates that the person who is caught and might be tortured actually knows information necessary to avert a catastrophe. But in the real world of the anti-terrorism campaign, there often will be reasonable doubt about whether the person whom the interrogator has before him really possesses such information. Even if one assumes that intelligence is good enough to pick out only those suspects who are actually in on a plot (and there is much reason to believe that this is not true), even correctly targeted suspects may not have relevant information about a particular upcoming attack. A captured member of al Qaeda, for example, would not necessarily know operational details of a particular plot, since that organization is highly decentralized and compartmentalized. And torturing such a detainee, even a “high value” one, only for *general* information or even for information about who *might* have the relevant knowledge does not come close to the situation in the hypothetical.

Truth. Even if the other conditions of the hypothetical are met and the interrogator tortures a knowledgeable suspect to acquire specific information, the information obtained may not be *true* or *useful*. The hypothetical assumes that the problem is solved once torture produces information. But in the real world, we know that people who are tortured will often say whatever it takes to make the torture stop. Information gathered under torture is notoriously unreliable. As a result, the information may not actually defuse the momentous, imminent, and certain threat.

The circumstances that make us so sure about what we would do in the hypothetical case of the nuclear weapon in Manhattan, then, do not carry over into any realistic picture of the world in which the actual decision to torture would be made. As a result, even if we were hypothetically willing to torture in the hypothetical case, such an inclination should not lead any of us to

countenance a *policy* of torturing detainees for information in the current “war on terrorism.” The real world will always be too far from the hypothetical to allow the hypothetical to guide us. I suspect that once we explore the real-world limitations, even die-hard consequentialists will have serious second thoughts. At least they *should have* second thoughts once the full context of decisions to torture is elaborated. As I will show, the specific contexts in which coercive interrogations have already been used to elicit information from detainees in the anti-terrorism campaign do not come close to the situation in the hypothetical. Being willing to permit torture in the hypothetical case, then, does not commit anyone to being willing to permit torture in the present “war on terrorism.”

Let me now consider more carefully each of these four challenges to the hypothetical in turn.

A. Bureaucracy

When an interrogator – a military interrogator, a civilian contractor, or an agent of the CIA – confronts a detainee, he⁵⁴ is hardly alone in the world as an independent moral agent. The interrogator is usually taking instructions from someone higher up in the bureaucracy about what techniques are permitted under the circumstances. In short, the interrogator is following orders, or at least standard operating procedures. Those who have to make the concrete and actual decisions about when to use torture are precisely *not* like the person in the hypothetical – a free-standing moral agent who is setting the terms of his own action and who is responsible primarily to his own conscience.

The decision to use torture in real-world terms is actually a determination about whether to include torture in a list of permissible interrogation techniques for use by agents in the military or intelligence bureaucracies. The decision to torture in the relevant context is, in other words, a decision about

54. Not all of those implicated in the abusive interrogations are men. When women are involved in interrogations, it seems from the cases of abuse we know about that gender is far from irrelevant to the interrogation. Lyndie England, for example, was one of the most visible offenders in the Abu Ghraib pictures, where she is shown with naked Iraqi prisoners, gesturing at their genitalia and holding a naked detainee on a leash. See DANNER, *supra* note 21, at 219, 222, 223. In fact, many of the abusive techniques of interrogation and treatment of detainees are explicitly sexually coded, as the Lyndie England pictures reveal. Women have also been involved in high-level policy making on this issue, and they have often been just as tough as, if not tougher than, the men. See, for example, the “legal brief” written by Lt. Col. Diane Beaver, approving of a variety of harsh interrogation tactics. Diane E. Beaver, Joint Task Force 170, Dept. of Defense, *Legal Brief on Proposed Counter-Resistance Strategies*, Oct. 11, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.10.11.pdf>, reprinted in DANNER, *supra* note 21, at 170.

what the standard operating procedures should be. Should the United States allow those acting in its name and under its authority to use these tactics as routine interrogation practices? The tactics might actually be employed in only a few cases, but they have to be contemplated as routinely available for a *class or category* of cases. Otherwise, the decision to torture would apply just to a single instance and would not implicate a rule.

Once we realize that we are talking about bureaucratic operating procedures and not the individual decisions of free moral agents, we should pause. How likely are we to be able to specify in a general form (for this is what a standard operating procedure is) just *when* we would allow an agent of the U.S. government to torture? We could write a rule that says, “When you are confronted in the middle of Manhattan by a person who is beyond doubt a terrorist and who has already set the timer on the nuclear bomb he has planted, torture him to get the information necessary to save millions of lives if there is no alternative.” But it would take thousands of such specific rules even to begin to anticipate every situation in which torture might be justified so precisely, and no such system of precise rules would ever be complete.

Let us try another sort of rule: “If you have captured someone you think is a high-value target, ask us for permission to torture.” This gets around the problem of trying to list every single situation in which torture might be justified. In fact, it is the approach that seems to have been taken by the Defense Department. A memorandum from Defense Secretary Donald Rumsfeld on April 16, 2003, listed interrogation techniques authorized for general use at Guantánamo Bay, Cuba.⁵⁵ It also indicated that harsher techniques than those listed were permissible, but only with individualized, high-level approval.⁵⁶ The torture warrants proposed by Alan Dershowitz⁵⁷ have something of the same structure: stop the action, ask permission, and then carry on if allowed. This may have the attraction of limiting the discretionary decisions to a smaller set of people who might be better trained in understanding when a situation would warrant torture.

If we turn again to our hypothetical, however, we can see problems with this approach as well. The hypothetical may tug at us because it posits an imminent threat. But asking permission takes time. Even assuming that procedures can be streamlined so that decisions are handed down quickly,

55. Memorandum from Donald Rumsfeld, *supra* note 43.

56. After describing techniques authorized for use with “unlawful combatants held,” the memo went on to add, “If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee.” *Id.*

57. Dershowitz, *Tortured Reasoning*, *supra* note 37, at 266-267.

there might be enough delay to question whether the danger is imminent enough to warrant torture in the first place. After all, if the nuclear bomb in Manhattan were not set to explode until next week, my guess is that many of us would doubt that torture was justified – at least immediately – to prevent it. Too many alternatives would have to be tried before torture would begin to emerge as acceptable.⁵⁸

If immediacy is really crucial to legitimizing torture, as our hypothetical indicates it is, and if any rule for torture therefore needs to permit immediate action, perhaps the rule should be modeled on protocols that allow instant, violent action in other life-threatening contexts. One such protocol allows police to use deadly force in the heat of the moment, when there is no time to stop the action to get permission. Use-of-deadly-force rules anticipate situations of high consequence and immediate decision, just as in the case of torture. In fact, the analogy between the use of deadly force and torture has been suggested provocatively by Winfried Brugger in the context of German law.⁵⁹ The general argument goes like this: If a soldier/police officer/interrogator would be justified in using deadly force to stop a terrorist from carrying out his deadly plans, then should torture not be allowed in the same circumstances toward the same end? Torturing a person, however troubling, is of equal or lesser moral magnitude than killing a person, and so situations that permit killing should also permit torture, the argument goes. Given that rules for the legitimate use of deadly force require immediate application in

58. What should the person giving permission (for example, a judge) inquire into? She should at a minimum determine whether all of the reasonable alternative approaches to obtaining the information were in fact exhausted, something that could not be done quickly if it were done well. She should then go on to inquire about the imminence and gravity of potential consequences, the reason to believe that the detainee has any relevant information, and whether information acquired by coercive interrogation would be true (and, if true, useful).

To address the problems of delay that a serious investigation would cause, an interrogator might be encouraged to seek a “just in case” torture warrant the day before a situation became urgent enough to allow its use, to make sure that the judge would have time to investigate whether the situation warranted the permission. While such a file-ahead approach would allow more time for the relevant aspects of the problem to be documented, it would also create perverse incentives to ask for permission before real imminence could be demonstrated.

There are other problems, however, in waiting until the eleventh hour to seek permission. An investigation by a judge would have to rely heavily on the word of the interrogator if time were of the essence. The interrogator might then be tempted to wait until the last minute to ask, precisely in order to have the greatest chance of getting the warrant.

These considerations indicate that the proper timing of a “torture warrant” is not at all obvious, and that difficulties in determining proper timing might undermine any appeal such a warrant would otherwise have.

59. Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661 (2000).

stressful situations, just as rules for torture would, we should look to how these rules are structured in order to determine how to design nuanced rules for torture in the context of a bureaucracy.

There are several problems with this approach. First, not all would agree that torture is of an equal or lesser moral magnitude than killing.⁶⁰ We care about *how* people are killed and not just that they are; torturing someone to death surely evokes a stronger moral response than “merely” killing a person outright. In fact, torturing someone and stopping *short* of death, leaving that person grievously wounded for life, may be even worse than a clean, fast killing.

Another problem is practical. How would such use-of-force guidelines be framed? The Justice Department uses an apparently straightforward standard for deadly force: “Law enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.”⁶¹ The standard anticipates an immediate threat, like that in the nuclear terrorist hypothetical. And, like the nuclear terrorist hypothetical, it indicates that deadly force can be used only to save a life or to prevent serious physical harm. Acknowledging the complexity of actual situations in which deadly force may be used, however, the Department of Justice has produced a separate explanation of its standard.⁶² The explanation reveals that

60. In fact, this is the crux of the persuasive argument made against torture in Henry Shue, *Torture*, in *TORTURE*, *supra* note 1, at 47-60.

61. Dept. of Justice, *Policy Statement: Use of Force* (n.d.), available at <http://www.usdoj.gov/ag/readingroom/resolution14b.htm>.

62. Department of Justice principles explaining the limits of the use of deadly force include the following:

III. Principles on Use of Deadly Force

... [T]he touchstone of the Department’s policy regarding the use of deadly force is *necessity*. Use of deadly force must be objectively reasonable under all the circumstances known to the officer at the time.

The necessity to use deadly force arises when all other available means of preventing imminent and grave danger to officers or other persons have failed or would be likely to fail. Thus, employing deadly force is permissible when there is no safe alternative to using such force, and without it the officer or others would face imminent and grave danger. An officer is not required to place him or herself, another officer, a suspect, or the public in unreasonable danger of death or serious physical injury before using deadly force.

Determining whether deadly force is necessary may involve instantaneous decisions that encompass many factors, such as the likelihood that the subject will use deadly force on the officer or others if such force is not used by the officer; the officer’s knowledge that the subject will likely acquiesce in arrest or recapture if the

the judgment to use deadly force is deeply context-driven, depending on factors too numerous to list. In short, use-of-deadly-force guidelines tend to embrace an all-things-considered-on-reasonable-suspicion standard that is hard to specify in advance with precision.

The U.S. Supreme Court weighed in on the question in *Tennessee v. Garner*, ruling in 1985 that a shoot-to-kill policy that allowed the use of deadly force against an unarmed escaping burglar was unconstitutional.⁶³ But this ruling has been qualified, distinguished, and criticized by many courts, including the Supreme Court itself, since then.⁶⁴ Four years after *Garner*, in *Graham v. Connor*,⁶⁵ the Court affirmed that a Fourth Amendment “reasonableness” standard is to be used in judging excessive force complaints against police.⁶⁶ The Court indicated, however, how hard it is to define what “reasonableness” means: “‘The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ . . .

officer uses lesser force or no force at all; the capabilities of the subject; the subject’s access to cover and weapons; the presence of other persons who may be at risk if force is or is not used; and the nature and the severity of the subject’s criminal conduct or the danger posed.

Deadly force should never be used upon mere suspicion that a crime, no matter how serious, was committed, or simply upon the officer’s determination that probable cause would support the arrest of the person being pursued or arrested for the commission of a crime. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.

As used in this policy, “imminent” has a broader meaning than “immediate” or “instantaneous.” The concept of “imminent” should be understood to be elastic, that is, involving a period of time dependent on the circumstances, rather than the fixed point of time implicit in the concept of “immediate” or “instantaneous.” Thus, a subject may pose an imminent danger even if he or she is not at that very moment pointing a weapon at the officer if, for example, he or she has a weapon within reach or is running for cover carrying a weapon or running to a place where the officer has reason to believe a weapon is available.

Dept. of Justice, *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations* (n.d.), available at <http://www.usdoj.gov/ag/readingroom/resolution14c.htm>.

63. 471 U.S. 1 (1985).

64. See Michael R. Smith, *Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v. Garner*, 7 KAN. J. L. & PUB. POL’Y 100 (1998); Richard P. Shafer, *When Does Police Officer’s Use of Force During Arrest Become So Excessive As To Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871* (42 U.S.C.A. §1983), 60 A.L.R. Fed. 204 (2004).

65. 490 U.S. 386 (1989).

66. *Id.* at 395.

its proper application requires careful attention to the facts and circumstances of each particular case.”⁶⁷ Moreover, the Court opined, “[t]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁶⁸ Thus, the Court adopted a standard that invariably leaves some uncertainty in predicting which judgments will be determined, after the fact, to have been reasonable.

Perhaps the most crucial element in the practical control of police conduct is the fact that virtually all uses of deadly force are investigated after the fact.⁶⁹ This may well make up for the inevitable vagueness in the prospective rules. Even if, over time, those who might use deadly force learn to anticipate what such investigations will conclude, it will be the training and experience that produce the discipline, not the rules.

The military’s standing rules of engagement provide instructions on the use of deadly force that are even vaguer than those for police: 1) when feasible give a warning first, 2) use proportionate means, and 3) attack only when prudent.⁷⁰ Moreover, these use-of-deadly-force rules are not based on a right of self-defense.⁷¹ Needless to say, if such a formulation were expanded to guide the use of torture in cases where uses of deadly force were permitted, this formulation would provide little help. Giving a warning is not necessarily a way to avoid the need to torture, but it might be part of the torture itself. Torturing only “when prudent” leaves it to the relatively unconstrained judgment of the person in the moment. Only the proportionality requirement has enough specificity to give practical guidance in any situation where torture might be used. And this guidance will not be enough to limit torture to the very few cases where we might otherwise believe torture would be warranted. For one thing, those making judgments in the heat of the moment will often overestimate both the threat they face and the benefits of the action they

67. *Id.* at 396 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

68. *Graham*, 490 U.S. at 396.

69. *See, e.g.*, the Web site of the Division of Criminal Justice for the State of Connecticut, containing reports on all uses of deadly force by police officers in that state, at <http://www.csao.state.ct.us/WhatsNews/deadlyforce.htm>.

70. Chairman of the Joint Chiefs of Staff Instruction 3121.01A, *Standing Rules of Engagement for U.S. Forces*, Jan. 15, 2001, available at <http://carlisle-www.army.mil/usacsl/divisions/pksoi/Military/Planning/Web%20roe%2001/sld014.htm>. *See* David Bolgiano et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense*, 31 U. BALT. L. REV. 157, 159 (2002) (“It would be an understatement to say that confusion exists among commanders and judge advocates as to what constitutes a reasonable use of deadly force by the U.S. military and when that force is authorized.”).

71. *See* Bolgiano et al., *supra* note 70, at 158-159.

contemplate.⁷² For another, proportionality tests are sufficiently slippery that it would be relatively easy for someone with a specific goal in mind to adjust the relative values of the “inputs” to get the desired “output,” whether self-consciously or not.

How, then, did the military ever manage to keep interrogations within reasonable bounds before the new debate over torture arose? Before the April 2003 Rumsfeld memorandum on techniques for individual interrogations,⁷³ the Army’s field manual entitled *Intelligence Interrogation*⁷⁴ listed in some detail the techniques that are permitted. But the manual does not attempt to dictate, as our hypothetical does, *when* techniques of different levels of severity may be used. All permissible techniques are permissible in *all interrogations*; more intrusive techniques are not restricted to high-stakes interrogations. Instead, the manual describes each interrogation technique (for example, “change of scenery,” “ego down,” or “use of incentives”) and indicates when that technique is likely to produce useful information. But the “when” is determined by the psychological state of the detainee,⁷⁵ not by the importance

72. A number of well-known findings regarding heuristic bias in reasoning would be easily applicable here. For a wonderful summary of materials on the limits of rationality and the prominence of heuristic biases, see Eldar Shafir & Robyn A. LeBoeuf, *Rationality*, 53 ANN. REV. OF PSYCHOL. 491 (2002). For example, people are highly risk-averse with respect to losses, particularly very big losses with tiny probabilities. This aversion therefore leads people to overestimate threats, especially ones with a potential for catastrophe. People are also worse at tasks in which they have to decide what to do when taking more rather than fewer factors into account, and yet they are typically highly overconfident about their judgment in solving harder problems. These tendencies lead people to believe that a hard problem is easier to solve than it really is. “Negative” moods (including fear) tend to lead to overestimating both the degree of risk and the frequency of undesirable effects. *Id.* at 498. In addition, the “perceived risk of things . . . is related to the amount of dread they arouse.” *Id.* at 499. The more time pressure there is, the more subjects are likely to see risks as negative. *Id.* at 499. All of these relationships suggest that those in a situation where complex decisions have to be made under both time pressure and the pressure of potentially momentous bad consequences will tend to exaggerate risks and see threats as more pronounced. These are not incentives one would want to build into rules for interrogation of detainees, given that the interrogations are very likely to be conducted under precisely these sorts of pressures.

73. Memorandum from Donald Rumsfeld, *supra* note 43.

74. DEPT. OF THE ARMY, INTELLIGENCE INTERROGATION (FM 34-52) (Sept. 28, 1992) (hereinafter ARMY FIELD MANUAL), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf>.

75. See, e.g., *id.* at 3-15 to -16:

The fear-up approach is the exploitation of a source’s preexisting fear during the period of capture and interrogation. The approach works best with young, inexperienced sources, or sources who exhibit a greater than normal amount of fear or nervousness. . . .

of the information the detainee might provide, the urgency of the situation, or the magnitude of the threat to be averted. All of the permissible techniques are always available, subject to the interrogator's judgment about what would be effective in a particular interrogation.⁷⁶

Traditional Army interrogation instructions, then, distinguish between permissible and impermissible techniques, with a bright line between the two. And there is a particular emphasis in drawing the line on maintaining a clear adherence to the Geneva Conventions,⁷⁷ in which soldiers are extensively trained. The Army's field manual does not, however, separate techniques to be used for "high-value" or "high-urgency" detainees from those to be used with garden-variety detainees, nor does it indicate that rules may be bent in situations of special crisis. In short, the pre-September 11 rules did not allow harsher techniques to be used when the information to be obtained might be crucial in saving many lives, even though one can imagine that any war (and not just the current "war on terror") would present situations in which interrogations might produce intelligence that would avert likely casualties. The traditional Army rules outlined one set of techniques that were available for all interrogations. They did not make the distinctions that the hypothetical suggests would be important.

Even the Bybee Memo,⁷⁸ which adopted such a cramped understanding of torture, never distinguished between urgent situations of great magnitude requiring immediate production of information, where harsher methods might be acceptable, and less urgent situations of uncertain magnitude in which traditional interrogation methods might be tried first.⁷⁹ The Bybee Memo

This approach has the greatest potential to violate the law of war. Great care must be taken to avoid threatening or coercing a source which is in violation of the GPW [Geneva Convention for the Treatment of Prisoners of War], Article 17.

76. See *id.* at 3-13 ("The number of approaches is limited only by the interrogator's skill. Almost any ruse or deception is usable so long as the provisions of the GPW . . . are not violated.").

77. Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 31; Convention (No. II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 85; Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 135; Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 287.

78. Bybee Memo, *supra* note 21.

79. The memo in general takes the same approach as the Army field manual – assessing what counts as torture and not entering into a discussion about precisely when harsher techniques would be justified in interrogation. In fact, the memo's author outlines the task that the Office of Legal Counsel was given as presenting the Office's "views regarding the standards of conduct under the Convention Against Torture" without presenting any qualifying conditions.

instead offered a legal basis for using harsher techniques *across the board* as general tools in all interrogations in the “war on terrorism” at the President’s discretion:

As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy. The demands of the Commander-in-Chief power are especially pronounced in the middle of a war in which the nation has already suffered a direct attack. In such a case, the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply [the torture statute] in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.⁸⁰

This analysis does not require the President to distinguish among situations along the lines that the hypothetical suggests. Because it prescribes no limits, it implies that any interrogation of “the enemy” conducted in the “war on terrorism” can use any technique. According to the memo, the President would even have the constitutional power to order actions forbidden by the torture statute – that is, torture itself – if the results gained through such interrogations might prevent future attacks.⁸¹

Since September 11, the Bush administration has apparently permitted the use of harsher techniques that are deemed by it to fall short of a narrow definition of torture,⁸² and it has tried to cabin these techniques in several

Id. at 1 (DANNER at 115).

80. *Id.* at 31 (DANNER at 142).

81. *Id.* at 31-39 (DANNER at 142-149).

82. *See, e.g., id.*; *see also* Beaver, *supra* note 54, at 6 (DANNER at 176-177):

With respect to the Category III advanced counter-resistance strategies, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent is not illegal for the . . . reasons that there is a compelling governmental interest and it is not done intentionally to cause prolonged harm. . . . The use of a wet towel to induce the misperception of suffocation would also be permissible if not done with the specific intent to cause prolonged mental harm, and absent medical evidence that it would.

The New York Times reported that the CIA was using a variety of harsh techniques, including “water-boarding” (making a detainee believe he was drowning by forcing his head under water). According to the *Times*:

The authorized tactics are primarily those methods used in the training of American Special Operations soldiers to prepare them for the possibility of being captured and taken prisoners of war. The tactics simulate torture, but officials say they are supposed to stop short of serious injury.

ways. It tried to confine the techniques to one physical location (Guantánamo).⁸³ It also tried to limit the techniques by permitting only some U.S. government agencies (for example, the CIA rather than the Defense Department) to use them.⁸⁴ In addition, it tried to restrict some of the

Counterterrorism officials say detainees have also been sent to third countries, where they are convinced that they might be executed, or tricked into believing they were being sent to such places. Some have been hooded, roughed up, soaked with water, and deprived of food, light and medications.

Risen, Johnston & Lewis, *supra* note 47.

83. See Memorandum from Donald Rumsfeld, *supra* note 43 (DANNER at 199) (“Use of these techniques is limited to interrogations of unlawful combatants held at Guantánamo Bay, Cuba.”). The techniques specifically authorized for Guantánamo included “removing the detainee from the standard interrogation setting and placing him in a setting that may be less comfortable,” “dietary manipulation,” “altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell),” “adjusting the sleep times of the detainee,” “convincing the detainee that individuals from a country other than the United States are interrogating him,” and “isolating the detainee from other detainees.” *Id.* (DANNER at 202).

84. The analysis presented in the Bybee Memo, *supra* note 21, was originally developed to provide legal guidance to the CIA. See Priest, *supra* note 30. The Bybee Memo did not list specific techniques available to the CIA, but press leaks have indicated that the CIA has been authorized to use especially harsh techniques not available to the DOD or FBI. See, e.g., Risen, Johnston & Lewis, *supra* note 47.

Separate guidance for the Department of Defense is provided in *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, Apr. 4, 2003, at 6, 35, available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf> [hereinafter Working Group Report], reprinted in part in DANNER, *supra* note 21, at 187. Although the Working Group Report duplicated the analysis of the Bybee Memo in large measure, it also uses a more explicit risk-benefit analysis on the acceptability of any particular interrogation technique: “any decision whether to authorize a technique is essentially a risk benefit analysis that generally takes into account the expected utility of the technique, the likelihood that any technique will be in violation of domestic or international law, and various policy considerations.” *Id.* at 65 (DANNER at 192). The legal analysis in the Working Group Report concludes that certain detainees who are “unlawful combatants” may be outside the protections offered by the Geneva Conventions, that “[c]ustomary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States,” and that “[t]he United States Constitution does not protect those individuals who are not United States citizens and who are outside the sovereign territory of the United States.” *Id.* at 67 (DANNER at 194). The report goes on to say that the Torture Convention *does* apply to these detainees, but it interprets the Convention’s requirement that detainees not be subject to “cruel, inhuman or degrading treatment” to mean that pain or harm could not be inflicted “without a legitimate purpose.” *Id.*

techniques by requiring specific permission for their use against specific detainees.⁸⁵

But attempts to confine these harsher techniques to specific places, specific agencies, and specific interrogations did not work. Instead, there has been a general “migration” of the newly sanctioned harsh tactics from the limited fields where they were initially authorized to a broader field of engagement.⁸⁶ This migration may be traceable, at least in part, to Army Major General Geoffrey Miller, who had been directing interrogations at Guantánamo. When Miller was sent to Iraq in August 2003 to “discuss current theater ability to exploit internees rapidly for actionable intelligence,”⁸⁷ he took the techniques he was using in Guantánamo with him, even though detainees in Iraq were supposed to be protected by the Geneva Conventions and therefore treated better than the Guantánamo detainees.⁸⁸ After Miller’s visit to Iraq, many of the abuses alleged to have been committed in Guantánamo surfaced in Iraq. There also are credible reports that interrogations in Afghanistan have used some of these same, more coercive interrogation techniques.⁸⁹

85. After describing a list of techniques authorized for use with “unlawful combatants held at Guantánamo Bay, Cuba,” the April 16, 2003, memo from Defense Secretary Rumsfeld, goes on to add, “If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with a particular detainee.” Memorandum from Donald Rumsfeld, *supra* note 43, at 1 (DANNER at 199).

86. See *Final Report of the Independent Panel to Review DOD Detention Operations*, Aug. 24, 2004 [hereinafter *Schlesinger Report*], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>, reprinted in DANNER, *supra* note 21, at 329. “Interrogators and lists of techniques circulated from Guantánamo and Afghanistan to Iraq. . . . It is important to note that techniques effective under carefully controlled conditions at Guantánamo became far more problematic when they migrated and were not adequately safeguarded.” *Id.* at 9 (DANNER at 333). Seymour Hersh’s reporting in *The New Yorker*, producing articles collected in SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004), quotes military and intelligence sources as saying that the newly authorized techniques quickly migrated throughout the American anti-terrorism effort. See *id.* at 48-66 for a description of the Special Access Program (SAP) that permitted the capture and killing of al Qaeda targets and that encouraged especially harsh interrogation of such detainees under Defense Department control.

87. *Schlesinger Report*, *supra* note 86, at 9 (DANNER at 334).

88. “Operation Iraqi Freedom . . . is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war.” *Id.* at 82 (DANNER at 375).

89. The Geneva Conventions were deemed not to apply to al Qaeda and Taliban detainees, and hence had a more limited role in the Afghan war than in Iraq. *Id.* at 6-7 (DANNER at 332). But coercive interrogation techniques authorized for Guantánamo seem to have migrated to Afghanistan as well: “Although specifically limited by the Secretary of Defense to Guantánamo, and requiring his personal approval (given in only two cases), the augmented techniques for

As any student of bureaucracy will know, this is exactly what one should expect. Someone trained with specialized knowledge in one position will tend to use that knowledge when moved to a new post. Particularly within the military, the rotation of troops virtually guarantees that those with such knowledge will be tempted to use it outside the restricted zones where the techniques were initially authorized. The Abu Ghraib prison scandal apparently resulted at least in part from use of the Guantánamo procedures outside their area of initial approval. Moreover, soldiers who witnessed what the CIA was allowed to do in the middle of the same “war on terrorism” may have been tempted to believe that they could do the same.⁹⁰ Those who watched the new techniques being used in one part of the operation must have wondered why they could not use the same techniques elsewhere in the same “war.”

Thus, attempts within the sprawling bureaucracies of the U.S. military and intelligence communities to limit coercive interrogation techniques to particular places, times, or groups of detainees have not worked. It is hard to imagine that efforts to constrain more extreme forms of torture will be any more effective.

B. Momentous, Imminent, and Certain Catastrophe

Assume for the moment, against the evidence, that we *could* draft standard operating procedures that would allow torture to be used in a targeted and limited set of interrogations that we could specify with precision, and that we could keep this set of practices within institutional bounds. What should that set of allowable uses of torture look like? Our nuclear terrorism hypothetical gives us guidance. The power of the example of the nuclear bomb in the middle of Manhattan suggests two important criteria: a) the threat must be *momentous*, and b) the threat must be *imminent*. There is, in addition, an implicit third criterion without which these first two cannot be evaluated: c) we must be *certain*, or at least reasonably so, that the threat is both imminent and momentous. I suspect that public support for torture in the hypothetical case would decrease if we were talking about a certain but mere conventional explosive, or about a threat certain but more remote in time.

Guantánamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.” *Id.* at 14 (DANNER at 337).

90. According to the *Schlesinger Report*, the CIA operated within DOD facilities in Iraq and was allowed to use different rules from those that applied to DOD interrogators: “[T]he CIA was allowed to operate under different rules. According to the Fay investigation, the CIA’s detention and interrogation practices contributed to a loss of accountability at Abu Ghraib.” *Id.* at 70 (DANNER at 368).

1. Momentous Consequences

Debunking the likelihood that one would face a terrorist with a weapon capable of inflicting truly mass casualties turns out to be relatively easy. The risks of terrorists getting hold of weapons of mass destruction – a standard ingredient in the extreme torture hypothetical – are not as high as one might guess from the hysteria that surrounds the possibility.

The risk of a terrorist acquiring a nuclear weapon is close to zero, and even the Bush administration is no longer devoting significant time or energy to the task of worrying about it.⁹¹ Although chemical weapons in the hands of terrorists are somewhat more realistically imaginable, there is a trade-off between the ease of manufacturing such weapons and the harm they could cause. The chemical weapons that one can realistically imagine al Qaeda being able to make would cause little damage; the successful delivery of really harmful chemicals poses enormous scientific and logistical challenges.⁹² That leaves biological weapons as a potential threat. But here too, though it is getting easier for a wider range of people to make biological weapons, it is still

91. A *Washington Post* story assessed the chances that al Qaeda could acquire a nuclear weapon:

Despite the obvious gravity of the threat, however, counterterrorism and nuclear experts in and out of government say they consider the danger more distant than immediate.

They point to enormous technical and logistical obstacles confronting would-be nuclear terrorists, and to the fact that neither al Qaeda nor any other group has come close to demonstrating the means to overcome them.

So difficult are the challenges that senior officials on President Bush’s national security team believe al Qaeda has shifted its attention to other efforts, at least for now.

Dafna Linzer, *Nuclear Capabilities May Elude Terrorists, Experts Say*, WASH. POST, Dec. 29, 2004, at A01.

92. *The Washington Post* reported about the chances that a chemical attack by terrorists would produce large numbers of casualties:

Because of the abundance of possibilities, many experts believe the odds for a chemical attack are relatively high, compared with biological or nuclear terrorism. Of the three, the chemical route is widely regarded as the easiest. . . .

But whether terrorists could manage a catastrophic attack is another matter, experts say. Somewhat comforting, they say, is the fact that assembling and dispersing deadly chemicals remain complicated and dangerous for amateurs. A review of foiled cases of chemical terrorism shows that the plotters often fall into police dragnets, bungle technical details, or expose themselves to death or injury.

Even a successful release of chemicals, many experts believe, would probably kill relatively few people compared with a sophisticated biological or nuclear attack.

Joby Warrick, *An Easier, but Less Deadly, Recipe for Terror*, WASH. POST, Dec. 31, 2004, at A01.

very difficult to make ones that carry high-level lethal force.⁹³ In all of the cases involving weapons of mass destruction, delivering the weapons in a manner that would cause mass casualties is far from straightforward. In short, given all we know about the most frightening weapons available, those most likely to fall into the hands of terrorists are the ones least likely to inflict mass casualties of the sort that the hypothetical imagines.⁹⁴

As a result, the most likely case that an interrogator will face in assessing the potential consequences of an attack will be one in which the probable magnitude is much smaller than in the hypothetical. If one is a pure consequentialist, of course, attacks of smaller magnitude would still produce a good argument for torturing just one person to save many others. But as the real world case falls away from the hypothetical, so too will consensus that torture will be justified. This will be especially true because estimates of the

93. As *The Washington Post* has reported:

Those skeptical of the prospect of large-scale bioattacks cite the tiny number of biological strikes in recent decades. . . .

One reason for the small number of attacks is that nearly every aspect of a bioterrorist's job is difficult. The best chance of acquiring the anthrax bacterium, *Bacillus anthracis*, is either from commercial culture collections in countries with lax security controls, or by digging in soil where livestock recently died of the disease – a tactic Aum Shinrikyo tried unsuccessfully in the Australian Outback.

Once virulent stocks of anthrax have been cultured, it is no trivial task to propagate pathogens with the required attributes for an aerosolized weapon: the hardiness to survive in an enclosed container and upon release into the atmosphere, the ability to lodge in the lungs, and the toxicity to kill. The particles' size is crucial: If they are too big, they fall to the ground, and if they are too small, they are exhaled from the body. If they are improperly made, static electricity can cause them to clump. . . .

Each bioagent demands specific weather conditions and requires unforgiving specifications for the spraying device employed. "Dry" anthrax is harder to make – it requires special equipment, and scientists must perform the dangerous job of milling particles to the right size. "Wet" anthrax is easier to produce but not as easily dispersed.

Experts agree that anthrax is the potential mass-casualty agent most accessible to terrorists. . . .

John Mintz, *Technical Hurdles Separate Terrorists from Biowarfare*, WASH. POST, Dec. 30, 2004, at A01.

94. I have not, of course, shown that WMD terrorism is impossible, only that the catastrophic attacks on which the hypothetical is based are the least likely sorts to occur. This is not a reason for complacency; those in high-level positions should monitor these risks to see if they change. Taking defensive action that makes the acquisition of WMD by terrorists less likely is also sensible. But in the extreme consequentialist analysis presupposed by the hypothetical, permitting torture to stop an imminent catastrophic attack requires a much greater likelihood of mass casualties than seems to be likely as I write.

likely harm are also likely to be much less certain in any actual case than in the hypothetical.

2. Imminence

In any terrorist attack, there will of course be a narrow window of time in which the attack is actually imminent, as it is in the hypothetical. But in most of the cases we know about, this has not been the window within which highly coercive techniques of interrogation are proposed for use. The only two terrorist attacks against American targets that seem to have been nipped in the bud – that is, while they were in progress in a way that “imminence” would suggest – were the attempted attack on the Los Angeles Airport on the eve of the millennium by Ahmed Ressay⁹⁵ and the attempted attack on the Paris-to-Miami flight of American Airlines Flight 66 on which Richard Reid was planning to detonate explosives in his shoes.⁹⁶ Once Ressay and Reid were captured, harsh interrogation techniques were not necessary, because their weapons were captured with them. And once their weapons were captured, the threat was gone, and the evidence against both was clear. Neither case presented the opportunity for a debate over the use of torture.

Instead, the use of coercive interrogation techniques has been proposed in cases where there *may* be a plot underway, but where the interrogators do not know about the plot in any detail, including its timing. Instead, interrogators will typically know only that a terrorist plot may be hatching, but they do not know when – or even *whether* – an actual attack will occur. If they do not know when or whether an attack will occur, it will be impossible to know that the attack is imminent.

In the Bybee Memo, the permission to use harsh interrogation techniques swept broadly across an imagined time horizon of threat:

Al Qaeda continues to plan further attacks, such as destroying American civilian airliners and killing American troops, which have

95. The factual background of the case is traced in a PBS Frontline special, *The Trail of a Terrorist*, Oct. 25, 2001 (outlining how the Algerian-born Canadian resident was able to cross the U.S.-Canadian border with a trunk full of explosives), at <http://www.pbs.org/wgbh/pages/frontline/shows/trail/>. See also Phil Hirschorn, *Boyhood Friend Fingers Defendant in Y2K Bomb Plot*, CNN.COM, July 2, 2001, at <http://www.cnn.com/2001/LAW/06/28/millennium.bombing/>.

96. See *Shoe Bomb Suspect Pleads Innocent*, CNN.COM, Jan. 18, 2002, at <http://www.cnn.com/2002/LAW/01/18/shoe.bomb.plea/index.html>. The indictment against Reid can be found at <http://news.findlaw.com/hdocs/docs/reid/usreid1002ind.pdf>, and the government’s sentencing memo, submitted after the plea bargain was concluded, can be found at <http://news.findlaw.com/hdocs/docs/reid/usreid11703sentm.pdf>.

fortunately been prevented. It is clear that bin Laden and his organization *have conducted* several violent attacks on the United States and its nationals, and that they *seek to continue* to do so. Thus, the capture and interrogation of such individuals is *clearly imperative* to our national security and defense. Interrogation of captured al Qaeda operatives *may provide information* concerning the nature of al Qaeda plans and the identities of its personnel, which *may prove invaluable* in preventing future direct attacks on the United States and its citizens. Given the massive destruction and loss of life caused by the September 11 attacks, *it is reasonable to believe* that information gained from al Qaeda personnel *could prevent* attacks of a similar (if not greater) magnitude from occurring in the United States.⁹⁷

In short, the Bybee Memo justified using coercive interrogation techniques right up to the edge of (a very limited view of) torture against al Qaeda suspects. Use of coercive techniques was justified in light of what al Qaeda had done in the past, which makes the techniques sound more like punishment than like the aversion of an imminent threat. And the memo found further justification in an assessment of motivation of what Osama bin Laden specifically and al Qaeda in general might do in the future (they “seek to continue” to carry out such attacks). This generalized motivation then justifies treating every al Qaeda member as if such an attack were always likely, in the memo’s analysis. There is no attempt in the memo to pick out particular imminent situations where harsher than normal techniques might be particularly justifiable.

3. Certainty

Suppose that you were faced with the decision to torture that the hypothetical suggests, where a suspected nuclear terrorist was thought to have planted a bomb in Manhattan. But suppose further that you get information about the nuclear weapon in Manhattan in an anonymous phone call whose reliability you could not assess. Or that you learned about the potential attack through translation of a document that literally said, “The chicken will lay the egg at 3 o’clock,” and that your intelligence services have told you they think that “egg” is a code word for nuclear weapon. Or suppose instead that you have spotted a threat to detonate a nuclear explosion in Manhattan on an Islamist Web site thought to be linked to al Qaeda. What if the detainee himself had bragged that he had the power to set off a nuclear weapon in

97. Bybee Memo, *supra* note 21, at 33 (DANNER at 144) (emphasis added).

Manhattan, but you were not sure about his capacity to do so, especially since he was already locked up? Would you still torture in any of these cases?

A great deal of real-world evidence tells us that the decision to torture will have to be made in situations that are never as clear as the hypothetical. One might well hope that the U.S. government knows far more than it is saying, but from what has been publicly disclosed, it has generally been impossible to learn the details of a terrorist plot with any certainty before the plot is launched. Even in those few cases where the government has had information specific enough to be actionable, the time frame has been fuzzy. And when the government has been clearer about the time frame, it has been fuzzier about the exact location of the threat.⁹⁸ Given that none of the raised color-coded alerts since September 11 has been accompanied either by a real terrorist attack⁹⁹ or by public evidence that an actual plot was foiled,¹⁰⁰ we

98. The U.S. government has nonetheless claimed enormous success in the war on terrorism:

United States intelligence and law enforcement communities, and our partners, both here and abroad, have identified and disrupted over 150 terrorist threats and cells. Worldwide, more than 3,000 terrorist operatives have been incapacitated.

Four terrorist cells in Buffalo, Detroit, Seattle, and Portland (Oregon), have been broken up; 300 individuals have been criminally charged in the United States in terrorism investigations; 163 individuals have been convicted or have pled guilty in the United States, including shoe-bomber Richard Reid and “American Taliban” John Walker Lindh.

Reply to the Counter-Terrorism Committee, Apr. 1, 2004, at 14, available at <http://daccess.dds.un.org/doc/UNDOC/GEN/N04/313/35/PDF/N0431335.pdf?OpenElement>.

99. The heightened color-coded alert in New York City and Newark, New Jersey in the summer of 2004 turned out to have been based primarily on the discovery of information that al Qaeda-connected plotters had put several buildings under surveillance in those cities *before* September 11, 2001. Dan Eggen & Dana Priest, *Pre-9/11 Acts Led To Alerts; Officials Not Sure Al Qaeda Continued To Spy on Buildings*, WASH. POST, Aug. 3, 2004, at A01. Not surprisingly, nothing happened.

100. The only concrete plot exposed in detail that seems to have stood up in any of terrorism prosecutions brought since September 11 was the attack planned by Richard Reid. It was interrupted as it was being attempted, not by intelligence services, but by passengers sitting around him on the airplane he wanted to bring down. Many of the other terror plots, so triumphantly announced by John Ashcroft, have turned to dust. See Kevin Sack, *Chasing Terrorists or Fears? Court Rulings Call the Attorney General’s Claims of Homefront Success into Question*, L.A. TIMES, Oct. 24, 2004, at A1; see also John Mintz, *Guantánamo Spy Cases Evaporate: Chaplain and Arabic Translator Are Now Facing Only Lesser Charges*, WASH. POST, Jan. 25, 2004, at A03; Dahlia Lithwick, *Trials and Terrors: These Are Our Banner Terror Trials?* SLATE, Apr. 16, 2004; Siobhan Roth, *Material Support Law: Weapon in War on Terror*, LEGAL TIMES, May 9, 2003.

have to guess that information about time, place, and the anticipated levels of destruction will rarely, if ever, be as clear as they are in the hypothetical.¹⁰¹

Instead, the evidence we have on the uses of coercive interrogation suggests that suspects who happen to be in custody will be questioned to find out *whether there is a plot*, not just *how to stop it*. And using coercive interrogation to discover whether there is a plot is precisely *not* the situation of the person facing the decision to torture the hypothetical ticking time bomb terrorist. The hypothetical envisions that the person making the decision to torture already knows with reasonable certainty that a plot exists.

American intelligence has had a bad track record of late in pinpointing threats. The African embassy bombings, the *USS Cole* attack, and September 11 itself all came as a shock, despite a plethora of generalized warnings. There were no weapons of mass destruction stockpiled in Iraq. Osama bin Laden is still at large. The discovery of the Millennium Bomber was a lucky accident. Whether José Padilla really planned to detonate a dirty bomb has been seriously challenged, not least by the government's own presentation of the evidence it has against him (which consists, by the way, largely of his own statements and the statements of others who apparently have been subjected to highly coercive interrogations).¹⁰² Richard Reid, the "shoe bomber," was

101. It is interesting to note that in some European cases, concrete plots have been laid out in evidence before courts in actual terrorism trials. In one, German prosecutors provided substantial evidence that the two men charged were concretely involved in the 9/11 plot itself. The trials were thwarted by the refusal of the U.S. government to share potentially exculpatory information from high-level al Qaeda suspects in U.S. custody. See Craig Whitlock, *9/11 Cases Proving Difficult in Germany; Suspects May Be Sent Elsewhere for Trial*, WASH. POST, Dec. 13, 2004, at A01. A trial of six terrorism suspects charged with plotting to blow up the American Embassy in Paris started in early January 2005. Katrin Bennhold, *Trial Begins in U.S. Embassy Plot; 6 Defendants in Paris Are Accused of Trying To Blow Up Building*, INT'L HERALD TRIBUNE, Jan. 4, 2005, at 3. By contrast, in the American cases, defendants have typically been charged with contributing "material support" to terrorist organizations, without evidence that a particular plot has been foiled.

102. Perhaps because the information the government relied upon had been obtained using coercion, it seems to have changed its story of the plot that José Padilla was hatching. Padilla is the U.S. citizen labeled an "enemy combatant" because the government claimed that he was planning to detonate a "dirty bomb." He has been held for more than three years without trial or charges and, until recently, without access to counsel. On the eve of the initial Supreme Court decision in the case, the Justice Department released a document claiming that Padilla had instead planned to blow up apartment buildings in New York City by using timers to cause natural gas explosions. See Eric Lichtblau, *U.S. Spells out Dangers Posed by Plot Suspect*, N.Y. TIMES, June 2, 2004, at A1; Dan Eggen, *U.S. Details Case Against Terror Suspect*, WASH. POST, June 2, 2004, at A01. That is still a very serious allegation, but one that takes his case out of the ticking nuclear bomb category. Statements implicating Padilla either were his own, were made without access to counsel, or were acquired through clearly coercive interrogations of high-level al Qaeda suspects. See Dan Christensen & Vanessa Blum, *Padilla Implicated in Florida Terror*

caught by fellow passengers as he tried to light explosives in his shoes in an airplane. Only the planned attacks of the blind cleric Abdul Sheikh Rahman in New York City were intercepted on the basis of good intelligence work, and that was nearly a decade ago – before the new wave of coercive interrogation techniques was approved. Since September 11, the only foiled terrorist plots that have been publicized in detail have been thwarted by European intelligence services, all of whom have foresworn torture.¹⁰³

The nuclear bomb hypothetical envisions that we will have certain, or near certain, knowledge of virtually everything about an imminent and momentous threat, except for a few tiny but crucial pieces of information. And it further imagines that the person we could choose to torture knows the crucial details that we do not (in this case, where the bomb is located and how to defuse it). In any real situation, however, it is highly unlikely that any interrogator would know enough to be justified in torturing someone to get the missing information. An interrogator in the “war on terrorism” is far more likely to have vague and general information, making it tempting to torture in an effort to learn whether there is a real threat in the first place. From what we

Case, LEGAL TIMES, Sept. 20, 2004, at 18 (“According to the government, Padilla ultimately traveled to Afghanistan in 2000. There, by his own admission, Padilla received training at an al Qaeda camp and discussed dirty bombs and blowing up apartment houses with the likes of Khalid Shaikh Mohammed, said to be the al Qaeda mastermind behind the Sept. 11 attacks. Deputy Attorney General James Comey . . . told reporters the government had little chance of using the information against Padilla in a criminal case ‘because we deprived him of access to his counsel and questioned him in the absence of counsel.’”); see also Michael Isikoff & Mark Hosenball, *Facing Defeat?* NEWSWEEK, June 9, 2004 (“The new information about the purposes of Padilla’s mission to the United States [was] apparently derived from interrogations with Khalid Shaikh Mohammed.”). Khalid Shaikh Mohammed is one of the al Qaeda detainees who was apparently waterboarded. Given the secrecy that has attended his capture and treatment, such conclusion is a matter of inference. See Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 17, 2005, at A01 (“an estimated three dozen people suspected of being terrorist leaders, including Khalid Shaikh Mohammed . . . remain in C.I.A. custody in secret sites around the world. Intelligence officials have acknowledged that the C.I.A. has used coercive techniques against those suspects, drawing from a list of practices approved within the Bush administration, including some not authorized for use by the military. . . . When Mr. McCain asked Mr. Goss about the C.I.A.’s previously reported use of a technique known as waterboarding, in which a prisoner is made to believe that he will drown, Mr. Goss replied only that the approach fell into ‘an area of what I will call professional interrogation techniques.’”).

103. For example, the plots to blow up the American embassies in Paris and Rome were foiled by French and Italian police. See, for the French plot, Sebastian Rotella, *6 Convicted in Paris in U.S. Embassy Plot*, L.A. TIMES, Mar. 16, 2005, at A03, and for the Italian plot, *Police Foil Rome Terror Plot*, REUTERS, Feb. 26, 2002, at 11. The plot to blow up the National Court in Madrid was foiled when one of the chief plotters confessed to a police informant on tape. See Isambard Wilkinson, *Terrorist Suspects “Planned Huge Blast in Madrid,”* DAILY TELEGRAPH (LONDON), Oct. 21, 2004, at 16.

have seen, coercive interrogations have not generally been used to ward off attacks whose precise coordinates are already known.

The hypothetical limits torture to cases where the torturer knows precisely what information he needs and precisely what threat exists. But using torture to discover *whether there is a threat in the first place* is exactly *not* the situation in the hypothetical. The real world evidence suggests that coercive interrogation is used instead to determine whether an attack has even been planned. The less certain we are that there is a concrete, imminent, and momentous threat to be averted, the less we can be sure that using torture to acquire information would be justifiable in terms of lives saved.

As we have seen, then, the promise of immensity, immediacy, and certainty in the nuclear bomb hypothetical carried us a long way in the justification of torture. As soon as these critical elements of the hypothetical go soft, so that we are not really sure that there *is* a nuclear weapon in Manhattan or that it *will* go off within hours, or that it *will* have such a massive destructive effect, then the case for torture looks less strong. Can one justify torturing someone for information if there *almost certainly is not* a nuclear weapon, or if there *may or may not be* a plot? Can torture be justified to find out *whether* there is a threat? In these more highly speculative, but more realistic cases, the argument for torture becomes impossibly weak.

C. Identity

The hypothetical assumes that the person the interrogator has before him is precisely the one who knows secrets that, if disclosed, would defuse the bomb. But what if the interrogator does not really know what information the person before him has? What if the interrogator is simply trying to find out who this person before him *is* – and whether, in fact, this person has *any* useful information? What if the interrogator has the wrong person?

These questions of identity are the real-world ones that seem most likely to arise in the concrete interrogation settings that we know about. By one report, the United States had some 50,000 detainees under its control in Afghanistan and Iraq between November 2001 and August 2004, with a peak population at any one time of about 11,000 detainees in March 2004.¹⁰⁴ This does not count the detainees at Guantánamo and in various other locations around the world, nor does it count those in the custody of America's allies who may be cooperating with U.S. intelligence services. Another report indicated that the United States held in detention abroad about 9,000 persons

104. *Schlesinger Report*, *supra* note 86, at 11 (DANNER at 335).

in May 2004, of whom about 8,000 were in Iraq.¹⁰⁵ Do we really believe that all of these detainees have relevant information of the sort that would justify highly coercive interrogation techniques?

Many of those taken into detention seem to have gotten there by mistake. Even at Guantánamo, for example, where the Bush administration once said it was housing the “worst of the worst,”¹⁰⁶ analyses of the credentials of those imprisoned there were sobering:

“It became obvious to us as we reviewed the evidence that, in many cases, we had simply gotten the slowest guys on the battlefield,” said Lt. Col. Thomas S. Berg, a member of the original military legal team set up to work on the prosecutions. “We literally found guys who had been shot in the butt.”¹⁰⁷

Those in charge of intelligence operations learned within a few months of the start of Guantánamo’s use as a detention facility that many of the detainees had no useful information to offer, and that in fact they seem to have wound up in entirely the wrong place. Already in March 2002, the intelligence officers working at Guantánamo realized that they did not have enough information on most of the detainees to fill in the one-page report that was required to certify that a detainee was involved with terrorism.¹⁰⁸ Of the more

105. See Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A01.

106. See Sue Anne Pressley, *Preparing for Role in War on Terror; Navy Base in Cuba to House Taliban, Al Qaeda Detainees*, WASH. POST, Jan. 10, 2002, at A12 (“[T]he U.S. military hurries to prepare for the arrival of prisoners whom officials have termed ‘the worst of the worst’ and ‘a nasty bunch of guys.’”).

107. Tim Golden, *Tough Justice – A Policy Unravels; Administration Officials Split over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1.

108. As reporter Tim Golden wrote:

The reserve officer chosen by Rumsfeld to lead the intelligence operation at Guantánamo, Major General Michael Dunlavey, was told soon after his arrival there in February 2002 that as many as half of the initial detainees were thought to be of little or no intelligence value, two officers familiar with the briefings said.

Intelligence officers at Guantánamo began reporting back that they did not have enough evidence on most prisoners to complete the required one-page forms certifying the president’s “reason to believe” their involvement with terrorism, officials said. By March 21, Defense Department officials indicated they would hold the Guantánamo prisoners indefinitely and on a different legal basis – as “enemy combatants” in a war against the United States.

Id.

than 600 men¹⁰⁹ imprisoned under harsh conditions at Guantánamo, intelligence officials estimated that at most two dozen had any useful information at all, and none were high-level al Qaeda operatives.¹¹⁰

Yet in December 2002 and again in April 2003, Secretary of Defense Donald Rumsfeld authorized the use of particularly coercive interrogation techniques at Guantánamo,¹¹¹ even though it had apparently long been known that the vast majority of the detainees there had little or no intelligence value. The techniques actually used on detainees involved sexual humiliation, isolation, “stress positions,” and exposure to extremes of heat and cold.¹¹²

109. It is hard to know precisely how many people have been held at Guantánamo. At any one time in the last two years or so, the number seems to have hovered close to 600. But there are constant releases and additions to this number, so the total number of detainees imprisoned there overall is probably several hundred more than that constant total.

110. According to a *New York Times* story:

In interviews, dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East said that contrary to the repeated assertions of senior administration officials, none of the detainees at the United States Naval Base at Guantánamo Bay ranked as leaders or senior operatives of Al Qaeda. They said only a relative handful – some put the number at about a dozen, others more than two dozen – were sworn Qaeda members or other militants able to elucidate the organization’s inner workings.

Tim Golden & Don van Natta Jr., *U.S. Said To Overstate Value of Guantánamo Detainees*, N.Y. TIMES, June 21, 2004, at A1.

111. Memorandum from Donald Rumsfeld to Commander US SOUTHCOM, *Counter-Resistance Techniques*, Jan. 15, 2003, reprinted in DANNER, *supra* note 21, at 183; Memorandum from Donald Rumsfeld, *supra* note 43, at 1 (DANNER at 199).

112. Four British detainees (the “Tipton Four”) who were eventually released from Guantánamo have alleged that they received harsh treatment, including solitary confinement, beatings, and endless interrogations. According to one account:

Month after month they were interrogated, for 12 hours or more at a time, by American security agencies and, repeatedly, by MI5 – in all, they say, they endured 200 sessions each. . . .

Yet despite the denial of legal rights or due process, the authorities on both sides of the Atlantic have been forced to accept what the three men said all along – that they were never members of the Taliban, al-Qaeda or any other militant group. The Americans had justified their detention by claiming they were “enemy combatants,” but they were never armed and did not fight.

David Rose, *Inside Guantanamo: How We Survived Jail Hell*, (SUNDAY) OBSERVER, Mar. 14, 2004, available at <http://www.guardian.co.uk/guantanamo/story/0,13743,1169178,00.html>. See also *Revealed: The Full Story of Guantanamo Britons*, (SUNDAY) OBSERVER, Mar. 14, 2004, available at http://observer.guardian.co.uk/uk_news/story/0,,1168976,00.html. The Tipton Four have filed suit against Secretary Rumsfeld and others, alleging:

In the course of their detention by the United States, Plaintiffs were repeatedly struck with rifle butts, punched, kicked and slapped. They were “short shackled” in painful “stress positions” for many hours at a time, causing deep flesh wounds and permanent scarring. Plaintiffs were also threatened with unmuzzled dogs, forced to strip naked,

Fresh allegations of the use of coercive techniques were still appearing in December 2004.¹¹³

What information has the Guantánamo interrogation program produced? Although the Bush administration has claimed great success, those involved in the interrogations seem to have concluded otherwise. A number of intelligence officials have said the Bush administration has “wildly exaggerated” the intelligence value of the Guantánamo interrogations, claiming that not a single terrorist attack has been prevented by information obtained through the interrogations.¹¹⁴

In Iraq, the use of coercive interrogation techniques seemed to range even more widely across a still larger variety of detainees. At the Abu Ghraib prison alone, where the most highly publicized abuses occurred, one Army investigation concluded that in fall 2003, some 4,000-5,000 “criminals, security detainees, and detainees with potential intelligence value” were being held.¹¹⁵ As the insurgency picked up and it was clear that U.S. forces in the field had no idea where the insurgency was coming from, a wider array of interrogation techniques was authorized for Iraq as well:

The solution [to the problem of not having enough intelligence to fight the insurgency], endorsed by Rumsfeld and carried out by Stephen Cambone, was to get tough with those Iraqi prisoners who were suspected of being insurgents. The Army prison system would now be asked to play its part. A key figure . . . was Major General Geoffrey Miller, the commander of the detention and interrogation center at Guantánamo, who had been summoned to Baghdad in late

subjected to repeated forced body cavity searches, intentionally subjected to extremes of heat and cold for the purpose of causing suffering, kept in filthy cages for 24 hours per day with no exercise or sanitation, denied access to necessary medical care, harassed in practicing their religion, deprived of adequate food, deprived of sleep, deprived of communication with family and friends, and deprived of information about their status.

Rasul v. Rumsfeld, C.A. No. (D.D.C. filed Oct. 27, 2004) (Complaint), available at <http://news.findlaw.com/hdocs/docs/terrorism/rasulrums102704cmp.html>.

113. See Vikram Dodd & Clare Dyer, *Guantánamo Torture and Humiliation Still Going On, Says Shackled Briton*, GUARDIAN, Dec. 11, 2004, at 1.

114. See Martin Bright, *Guantanamo Has “Failed To Prevent Terror Attacks,”* (SUNDAY) OBSERVER, Oct. 3, 2004, at 1.

115. *Executive Summary of Intelligence Activities at Abu Ghraib*, Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, and George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (together called the Fay-Jones Report), Aug. 23, 2004, at 16, available at <http://www.dod.mil/news/Aug2004/d20040825fay.pdf> (partially redacted), reprinted in DANNER, *supra* note 21, at 403, 418.

August to review prison interrogation procedures. Rumsfeld and Cambone went a step beyond Gitmoizing, however: they expanded the scope of the SAP [special access program], bringing its unconventional methods to . . . operate in Iraq as they had in Afghanistan. The male prisoners could be treated roughly and exposed to sexual humiliation.¹¹⁶

But were the harsher techniques used only on those who clearly had relevant information? It seems that in Iraq, as at Guantánamo, military personnel subjected many detainees to abuse when there was no clear evidence that those abused would have the sort of relevant information that the hypothetical requires. While some officers claimed that the Iraqi interrogations paid off in valuable intelligence,¹¹⁷ others indicated that many of the detainees who were abused had no intelligence value at all.¹¹⁸ U.S. troops seem to have had a policy of detaining all of the men who could be found in the vicinity of someone else they were looking for. This policy was attributable both to the lack of language skills that would have enabled troops to question suspects in the field and also to a general disregard for the consequences of detaining persons who had nothing to do with the insurgency.

In perhaps the most shocking estimate of “mistakes” made in detaining people in Iraq, the International Committee of the Red Cross noted, in a highly critical report given to United States authorities in February 2004, that “between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake.”¹¹⁹ Not all of those detained in Iraq were

116. HERSH, *supra* note 86, at 59.

117. See, e.g., John Hendren, *Army Limits Methods Used on Detainees; Harsh Techniques – Such as Sleep Deprivation, Hoods, Nudity and Exposure to Military Dogs – Are Banned in Iraq After the International Outcry*, L.A. TIMES, May 15, 2004, at A1 (“‘I can’t go into specifics, but know that interrogation was a key thing that led to the capture of Saddam Hussein,’ said one of the officials, who asked to remain anonymous. ‘We have gotten some great information on additional terrorist threats in Iraq, on radical Sunni Islamists working with former regime elements and how that working relationship takes place.’”)

118. See Richard A. Serrano, *The Conflict in Iraq; Abused Iraqi Detainees Said To Hold No Intelligence Value*, L.A. TIMES, Aug. 4, 2004, at A4 (“Senior Army criminal investigators testified Tuesday that the inmates who were abused and sexually humiliated last year at Abu Ghraib prison in Iraq were of little or no intelligence value to the United States.”). Among those Iraqis shown in the photographs of naked pileups at Abu Ghraib prison, only two were ever interrogated, and none was found to be of “intelligence value.” *Id.*

119. REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION, Feb. 2004, at 8 [hereinafter RED CROSS REPORT], available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf. ICRC reports are, as a general

interrogated, and some of the most egregious abuses against detainees occurred outside the context of interrogation.¹²⁰ During interrogation, however, treatment was often severe:

The ill-treatment by [Coalition Force] personnel during interrogation was not systematic, *except with regard to persons arrested in connection with suspected security offenses or deemed to have an “intelligence” value*. In these cases, persons deprived of their liberty supervised by the military intelligence were subjected to a variety of ill-treatments ranging from insults and humiliation to both physical and psychological coercion *that in some cases might amount to torture* in order to force them to cooperate with their interrogators. . . . Several military intelligence officers confirmed to the ICRC that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period, to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation.¹²¹

According to the Fay Report on Abu Ghraib, of the more than 8,500 detainees processed at Abu Ghraib by May 2004, no more than 3,200 were deemed to have “intelligence value.”¹²² Yet according to the Red Cross, this was precisely the classification that subjected the detainees “in a systematic

rule, not published. They are issued only to the detaining authority of the prisoners visited. This particular report, however, was leaked.

120. The Red Cross reported on violence outside the context of interrogation:

- brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury
- absence of notification of arrest of persons deprived of their liberty to their families, causing distress among persons deprived of their liberties and their families . . .
- prolonged solitary confinement in cells devoid of daylight
- excessive and disproportionate use of force against persons deprived of their liberty, resulting in death or injury during their period of internment

Id. at 3. Given this catalogue, some of the most brutal treatment of detainees apparently occurred at times outside of formal interrogation, for example upon their capture and during their initial custody. In addition, the prolonged use of solitary confinement would, by definition, not occur during interrogation sessions.

121. *Id.* at 11 (emphasis added).

122. George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, *supra* note 115, at 38 (DANNER at 474). A chart depicting the total “hold” population in any given month is set out *id.* at 39 (DANNER at 475).

way” to ill-treatment.¹²³ We do not know precisely how many of these detainees were exposed to the treatment documented by the Red Cross, although their assessment that harsh treatment was “systematic” implies that it was not just a few detainees who experienced this ill-treatment. At Abu Ghraib, in particular, the Red Cross noted that in the “Abu Ghraib military intelligence section, methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and to extract information.”¹²⁴ One detainee at Abu Ghraib was found to be “unresponsive to verbal and painful stimuli,” which Red Cross medical personnel attributed to “the ill-treatment he was subjected to during interrogation.”¹²⁵ At a minimum, we can probably assume that not all of those interrogated possessed the “narrowly relevant information” that the hypothetical seems to envision. Abusive interrogation techniques were undoubtedly used against a much broader spectrum of detainees than the hypothetical would cover.

What, then, about so-called “high value targets,” those whom interrogators believe are significant figures in the various terrorist plots against the United States and who would, one might think, be likely to have more valuable information? These would include people like Khalid Shaikh Mohammed (who claimed on Arab satellite television to have masterminded the 9/11 plot), Ramzi bin al Shibh (who was behind several prior attacks against American targets), Abu Zubaida (bin Laden’s most senior lieutenant in captivity), and Nurjaman Riduan Isamuddin (also called Hambali – known for audacious attacks in Asia). Evidence that they have committed horrible offenses in the past is quite strong; all were high enough in the Islamist networks to have a view that would no doubt be helpful at giving interrogators some clue about how these networks operate. We know that they are in U.S. (probably CIA) custody somewhere, and some sources have claimed that they have been interrogated using the most aggressive methods available.¹²⁶ Surely these

123. RED CROSS REPORT, *supra* note 119, at 11-12. The more specific techniques that the Red Cross documented during Coalition Force interrogations in Iraq included hooding, handcuffing with very tight handcuffs that caused nerve damage, beatings, pressing the face into the ground with boots, threats of reprisal against family members, threats of imminent execution, threats of being sent to Guantánamo, being stripped naked and held in solitary confinement, deprivation of sleep or food or water, being paraded naked in front of other detainees, being draped with women’s underwear, being attached with handcuffs to the cell door in uncomfortable positions for prolonged periods, exposure to loud music or to the sun or to extreme temperatures, and being forced to stay in stress positions for prolonged periods. *Id.* at 12.

124. *Id.* at 11.

125. *Id.* at 13.

126. Risen, Johnston & Lewis, *supra* note 47.

detainees, above all others, are the candidates most like the nuclear terrorist in the hypothetical and therefore the most likely to be subject to “justifiable” torture, if the hypothetical is any guide. But what kind of information could torture of such detainees possibly produce?

From all we know about al Qaeda and how it operates, much of the operational information that would be relevant to exposing and thwarting an ongoing attack would not in fact be known by those so high up in the organization. The *9/11 Commission Report* makes clear that at least some of these high-level al Qaeda operatives did have detailed knowledge of already completed operations. But only a few, and not even all of those who took part in the 9/11 hijackings, knew beforehand.¹²⁷ Would interrogation to gather knowledge about past attacks bear sufficient similarity to the hypothetical to permit torture? I think not. Whatever else might be gained from knowledge of a completed attack, saving enough lives to warrant torture would not be among the advantages. Torturing to acquire information about a past attack would not rise to the level that the hypothetical suggests would be necessary.

What about future attacks? We know about al Qaeda attacks that those high up in the organization may give general permission for a major attack, but the operational details (the ones most crucial to actually foiling an attack and saving lives) are typically left to local commanders, who, together with those who are going to carry out the plot, are often the only ones who know the precise time, place, and method of the attack.¹²⁸ What one would get from “high value” targets, then, might not be operational information about specific attacks that would enable authorities to intervene directly to stop them, but instead general operating procedures and lists of participants in the networks, who in turn might have information that could be used to stop an attack. Does

127. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 146 (2004). (“Chapters 5 and 7 [of the Final Report] rely heavily on information obtained from captured al Qaeda members. A number of these ‘detainees’ have firsthand knowledge of the 9/11 plot.”) Of course, by the time they were interrogated, that plot was already over. According to the interrogations of Khalid Shaikh Mohammed, “only a handful of al Qaeda operatives” were aware of the full details of the 9/11 plot before it occurred. Even the so-called “muscle hijackers” themselves did not know the complete picture until shortly before the attack – involving them – was carried out. *Id.* at 236.

128. The two cases about which we know the most, because they were the subject of public trials and involved the presentation of large amounts of public information, are the Millennium Bomber case and the African embassy bombings plot. In each instance, those who would have had the relevant and detailed knowledge to prevent the actual attack were only one level above the suicide bombers who carried out the attacks. For the detailed evidence on the Millennium Bomber case, see PBS Frontline, *The Trail of a Terrorist*, *supra* note 95; for public evidence in the African embassy bombings case, see the TRANSCRIPT OF UNITED STATES V. BIN LADEN [hereinafter TRANSCRIPT], on file with the author.

the hypothetical permit torture in order to get *general* information or the names of those who *might* have specific information of the sort that appears in the hypothetical – direct and operative plot-breaking information? The farther away the knowledge gained through torture is from that sort of information, the less the real-world situation approximates the hypothetical.

The hypothetical assumes a particularly simple sort of attack and therefore also a very straightforward form of knowledge that would prevent it. One difficulty likely to be encountered in a real-world plot is that the supposed terrorist will rarely be acting alone.¹²⁹ As a result, it is likely that accomplices or associates could modify the plot upon the detainee's capture. Most of the al Qaeda plots that we know of are both collective and also seem to be responsive to their own detection. If someone crucial to the plot is captured, then others are likely to scatter and postpone the attack (or speed it up so that information from interrogation of a captured plotter cannot be used to thwart the attack). For example, in the case of the bombings of the two American embassies in Kenya and Tanzania, the plot did not hit its fully operational stage until about 24 hours ahead of the attack, when all of the elements were finally in place.¹³⁰ Even then, the plot could have been diverted or postponed if the plotters had thought it might be intercepted or if someone had been captured. Even assuming that interrogators have before them someone who did at one point have the relevant operational knowledge, by the time of the interrogation the knowledge may already be obsolete because of the actions of the co-plotters.

Which brings us to the question of how long coercive interrogations can last. Some of the high-value targets against whom highly coercive interrogation techniques have been used have been in custody now for several years, yet it appears that their interrogation continues. Whatever operationally relevant information they may have had (and, as I have argued, they may have had none of the sort that the hypothetical envisions to begin with), it is almost surely the case that their knowledge is no longer relevant to preventing any actual planned attacks, except perhaps indirectly, through enabling investigators to track down others who may have more current information. There should come a point in time when any justification for highly coercive interrogation techniques of someone in captivity disappears entirely. It should disappear in hours probably, days certainly. But in the “war on terrorism,”

129. The notable exceptions are Ted Kaczynski (the Unabomber) and Eric Rudolph, who planted bombs at family planning clinics and at the Atlanta Olympics, both terrorists by any definition.

130. See TRANSCRIPT, *supra* note 128.

some interrogations have gone on for years. And the permissible interrogation techniques seem to have gotten harsher as time has passed.¹³¹

Thus, it appears that coercive interrogation practices have been used against a large number of detainees who never had relevant information in the sense required by the hypothetical. Even among high-value detainees who had relevant information when they were captured, the period within which their knowledge would have been relevant to stopping an actual attack must have long since expired. Who, then, would be a legitimate target for such coercive interrogation techniques? It is surely a much smaller set than those who have been subjected to torture already. And it includes perhaps no one at all.

D. Truth

The hypothetical of the nuclear terrorist assumes that if one does in fact torture, reliable information capable of preventing an attack will emerge. But what do we know about whether torture produces truth? Of course, there are no controlled experiments that give us a clear answer to the question; such experiments would never be allowed. So we have to piece together other information to determine whether torture, when practiced, really produces the information that would justify the techniques used. Torture that produces no true or useful information would have no value, even on a consequentialist account. It is therefore crucial to the relevance of the hypothetical that torture produce information that can be relied upon.

Does it? All of the available evidence indicates that, while torture may on rare occasions produce true and useful information, it does not do so reliably enough to count on. A recently released CIA manual from the 1960s presented

131. Since the interrogations have been conducted in secret, it is of course impossible to know for sure. But circumstantial evidence contained in written documents indicates that it took more than two years after 9/11 for the harshest interrogation techniques to be authorized. As the date of the Bybee Memo (August 1, 2002) indicates, it took nearly a year after 9/11 before techniques coming close to torture were authorized in the first place. Bybee Memo, *supra* note 21. Even then, in October 2002, the commander of the interrogation teams at Guantánamo begged to be allowed to use harsher interrogation techniques than those permitted already. James Meek, *G2: "Nobody Is Talking,"* GUARDIAN, Feb. 18, 2005, at 2. In October 2003, a full year later, Rumsfeld approved some of the techniques that had been requested in October 2002. *Id.* Only when the Bybee Memo leaked in June 2004 were the harsher techniques pulled back. Priest, *supra* note 30. Between 9/11 and June 2004, then, the permissible techniques of interrogation seem to have gotten harsher, rather than less harsh, over time, even though the time between capture and interrogation for many of the high-value detainees made it less likely that their information would be the sort that could stop an imminent attack.

“basic information about coercive techniques available for use in the interrogation situation.”¹³² It coldly assessed the value of these techniques:

When it [came] to torture . . . the handbook advised that “the threat to inflict pain . . . can trigger fears more damaging than the immediate sensation of pain.”

“In general, direct physical brutality creates only resentment, hostility and further defiance,” the manual said.

Intense pain, interrogators were taught, “is quite likely to produce false confessions concocted as a means of escaping from distress.”¹³³

The manual did suggest techniques for producing useful information – like disorienting detainees by changing sleep or meal times, humiliating proud detainees by giving them clothes so big that they had to be held in place constantly, and sensory deprivation. Threats of death, however, were often found to be “worse than useless,”¹³⁴ and the actual infliction of pain produced nothing reliable. From the CIA’s own practices, then, it seems that many of the interrogation techniques similar to those currently in use have already been determined not to produce actionable intelligence.

Other sources bear this out. Seymour Hersh quotes Willie Rowell, who worked in Army intelligence for 36 years, as saying that the use of force or humiliation with detainees is counterproductive: “They’ll tell you what you want to hear, truth or no truth You can flog me until I tell you what I know you want me to say. You don’t get righteous information.”¹³⁵ Some of the crucial evidence that there were weapons of mass destruction in Iraq reportedly was acquired through torture.¹³⁶ According to one account, “A mountain of evidence on the effectiveness of torture indicates why this supposed evidence of a relationship between Iraq and al Qaeda proved inaccurate – torture victims tell interrogators what they want to hear.”¹³⁷

132. Walter Pincus, *Iraq Tactics Have Long History with U.S. Interrogators*, WASH. POST, June 13, 2004 at A08, quoting CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION, July 1963 [hereinafter KUBARK MANUAL], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/#kubark>.

133. Pincus, *supra* note 132.

134. KUBARK MANUAL, *supra* note 132, at 92.

135. HERSH, *supra* note 86, at 66.

136. See Ken Gude, *They Got What They Wanted: The Folly of the Bush Administration’s Torture Policy*, THE PROGRESS REPORT, Aug. 5, 2004, available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=134740>.

137. *Id.* Gude also noted, “The Japanese militarists during World War II were not noted for their respect for human rights, yet they still cautioned in their interrogation manual, ‘Care must be exercised when making use of rebukes, invectives or torture as it will result in his telling

A study by Albert Biderman in the 1950s of American Air Force personnel captured during the Korean War showed that methods of psychological manipulation falling well short of torture were much more effective than either threats or actual violence in getting prisoners of war to talk.¹³⁸ In France, where torture was long condoned by the courts, the practice was abandoned in the 18th century, at least in part because of doubts that it could produce truth.¹³⁹

In short, while there may be isolated cases in which coercive interrogation produces useful information, one cannot count on the reliability of the information so produced. Unlike in the hypothetical, where the information is supposed to lead inexorably to the defusing of a bomb, information obtained through real-world torture may well be false. At a minimum, it would have to be checked against other evidence to determine its reliability. And, if there were other ways to tell whether that information elicited through torture was reliable, would one really need to torture to get the crucial information in the first place?

CONCLUSION: THE IRRESPONSIBLE HYPOTHETICAL

Although at least one commentator has said that it would be “irresponsible” not to be willing to torture in situations like the hypothetical,¹⁴⁰ the use of extreme hypotheticals to guide our thinking about whether torture is justifiable as a matter of general policy is more clearly irresponsible. The extreme quality of the nuclear terrorism hypothetical tends to tip the balance toward permitting torture. But, as I have tried to show, this hypothetical fails to track many of the important facts that would bear on any real decision, and thus it does not tell us much about the actual moral issues at stake. Permitting torture in the hypothetical case, in other words, does not answer what one should counsel in the present debate over coercive interrogation techniques in the “war on terrorism.” The hypothetical only highlights the consequentialist balancing of lives in a context cleansed of all other crucial factors. It tells us nothing more than what we already knew – that a tiny risk of catastrophe can

falsehoods and making a fool of you. [Torture] is only to be used when everything else has failed as it is the most clumsy [method].”

138. Albert D. Biderman, *Social-Psychological Needs and “Involuntary” Behavior as Illustrated by Compliance in Interrogation*, 23 *SOCIOMETRY* 120, 140-141 (1960).

139. See LISA SILVERMAN, *TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE* (2001); see also JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 55, 64 (1977).

140. Posner, *supra* note 1, at 295.

swamp all other concerns in a moral judgment.¹⁴¹ Sensible moral judgment requires a better sociological analysis.

The torture hypothetical does not take into account the absolutely predictable doubt that an interrogator would have over whether there is a serious and immediate threat looming at the moment of decision, and over whether the person to be interrogated really has information that would stop an attack. The hypothetical also does not take into account the inevitable imprecision of rules in a situation where it would be morally necessary to be very precise. Nor does the hypothetical consider the contagion of contexts that make the operation of rules hard to cabin. The hypothetical presumes, against the evidence, that torture really does produce truth. Given that there would be a great deal of uncertainty in any real-world situation where such a decision would be made, it is impossible to be the sort of consequentialist that the hypothetical presupposes. Or at least, it is impossible to be a responsible consequentialist.

The hypothetical, after all, presents the purity of the extreme. One clearly guilty person's pain is offset against multitudes of innocent lives. The hypothetical case of the nuclear terrorist in Manhattan with the bomb set to go off might well persuade even the most principled objector to agree that torture is *sometimes* justifiable. But the question then is, what does that tell us about the situation that we actually confront?

I submit that one can be a consequentialist and say that torture should be permissible in the hypothetical case, while still holding firm to the view that, nonetheless, torture should be absolutely prohibited, even in the present situation of terrorist threat.¹⁴² The consequences one is invited to weigh in the hypothetical pull one toward justifying torture precisely because they are presented in the most artificially isolated way. When it comes to real decisions in real contexts, however, the world will never be as straightforward as it looks in the hypothetical. As a result, one could find the implicit moral calculus in the hypothetical beguiling as a matter of theory and still be an absolutist on torture as a matter of practice.

There is nothing inconsistent about this view. Any sensible consequentialist would want reliable estimates of the costs of various alternatives before making a moral choice or designing a moral policy. The inability – the *structural* inability – to come up with reliable estimates of many

141. See Shafir & LeBoeuf, *supra* note 72, at 496, on “loss aversion.”

142. I am indebted to a very useful exchange between Philip Pettit and John Cooper over this paper at the Law and Public Affairs Workshop at Princeton University on January 31, 2005, for helping me to see that consequentialism and deontological views of torture were not as incompatible as they might appear. I may not have drawn from their helpful counsel what they intended, but I am grateful for their assistance.

of the crucial values in the case of torture is not, by itself, an argument against consequentialism. It might, however, make a committed consequentialist much less willing to act on the intuition that one should sacrifice one life to save many. The “war on terrorism” has prompted the use of highly coercive interrogation techniques in situations that depart rather dramatically from what the hypothetical requires to justify torture. Yet a sensible consequentialist would not assume that finding justification in the hypothetical covers cases that bear no resemblance to it.

Most of the permitted coercive interrogation techniques have been approved across the board for all detainees held by the military or the CIA, without requiring that they be reserved for situations that approximate the nuclear terrorist hypothetical.¹⁴³ Even where the use of aggressive techniques has required permission from higher-ups, they have migrated from the contexts in which they were initially approved (for example, at Guantánamo) to contexts for which they were not designed (for example, in the general treatment of detainees in Iraq, even outside of interrogation). One can imagine from this that any policy permitting torture will be difficult to limit to the specific contexts tracked by the hypothetical.

In addition, the highly coercive interrogation techniques that have already been used have not been limited to situations in which there is an imminent and momentous threat, or to situations in which the detainee is clearly known to possess information relevant to stopping an actual and immediate attack. Instead, the techniques have been used much more generally, to find out *whether* there are any plots or *whether* the person being detained has relevant information. Highly coercive interrogations have been used for general fishing expeditions and not for the sort of targeted interrogations imagined in the hypothetical.

Finally, these highly coercive interrogation techniques do not reliably produce information that could be used to stop attacks. Many long-time interrogators have given up the use of force because they are persuaded that it does not work, not because they are standing on principle against it. If torture does not work, then there can be no consequentialist argument that favors it.

143. The CIA seems to have had its own special set of coercive techniques, but it is not clear from sources available thus far whether those techniques have been used in a differentiated way on the individuals the CIA is holding. Presumably, not all of the individuals would possess narrowly relevant information that could be used in stopping an imminent and serious attack.

So what is left of the hypothetical in the end? If the hypothetical persuades anyone to support torture, it does so by creating an imaginary world. But that is not the world in which choices about torture are made. In the real world of the “war on terrorism,” torture cannot be justified.