

HYPOTHETICAL TORTURE IN THE “WAR ON TERRORISM”¹

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Normative discussions about torture typically start with the same 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 allows you to defuse the bomb, thereby saving the lives of millions of people? Or do you stand on principle and sacrifice multitudes?²

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2 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 circumstances” such as the threat of a nuclear attack, [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.

Tom Ridge was speaking on BBC News 24’s HARDtalk, broadcast on Friday, 14 January at 1930 GMT on BBC World. *US ‘Should Not Rule out Torture’: The Former Head of the US Department of Homeland Security has said Torture may be used in Certain Cases in order to Prevent a Major Loss of Life.* BBC News, 14 January 2005. available at: <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4175713.stm>.

Put that way, the decision seems easy. Of course, you would torture. Only those completely immune to grotesquely bad consequences would not.³

From there, it is a simple proposition to argue that, since you would torture in *that* case, it can't be true that you would *never* torture, as international law and human rights advocates would have it. And once we've established that there is *some* point at which a trade-off between "lives saved" and "techniques used" can occur, 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 tends to tip the scales in favor of torture because the consequences of an undiverted attack can be enormous.

In this Article, I want to resist this slide into consequentialism and defend a hard line against 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

Since September 11, the hypothetical has been used very vividly in ALAN DERSHOWITZ, *HOW TERRORISM WORKS* (2002) in which his chapter on torture is directly called *Should the Ticking Time Bomb Terrorist be Tortured?* A variant is also used in Jean Bethke Elstain, *Reflections on the Problem of 'Dirty Hands'* pp. 77- 89 in SANFORD LEVINSON, *TORTURE: A COLLECTION* (Oxford U Press, 2004) (hereinafter LEVINSON, *TORTURE*) (nuclear bomb in an elementary school). The case is also invoked by Oren Gross, *The Prohibition on Torture and the Limits of the Law*, pp. 229-253 in LEVINSON, *TORTURE* ("a massive bomb is ticking in a mall" at 237 – see also note 2 at 250), as part of his general argument against an "absolutist" prohibition on torture. 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." Posner, *Torture, Terrorism and Interrogation*, pp. 291-298 in LEVINSON, *TORTURE* at 293.

But the hypothetical was not invented only after September 11. In discussing whether it would be justifiable to torture, Charles Black used the 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 country police station twenty miles away . . ." Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, *HARPER'S MAG.*, 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 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* 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 example is that nearly all of those who use this particular hypothetical wind up justifying torture in at least some cases. Only Charles Black is the exception.

³ Some, like Richard Posner, even consider the absolutist position against torture "irresponsible." See Posner, *id.* at 295.

dignity, even that of terrorists.⁴ Terrorism is serious, but we lose a great deal more than this war if we sink to the level of the terrorists by sharing their disregard for rights and the dignity of others.

I would also be willing to mount the defense on legal grounds. The international Convention against Torture (CAT)⁵ is absolute (non-derogable, in legal parlance) and binds even the United States. The reservations⁶ that the US attached to this treaty may allow the US, legally

4 Henry Shue's classic article, "Torture," 7 PHILOSOPHY AND PUBLIC AFFAIRS 124-143 (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, then, torture would run afoul of the general principle that one cannot 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." This allows the author to argue that torture is wrong not as a form of violence only, but instead as a form of "forced betrayal" more like rape. David Sussman, "What's Wrong with Torture?" 33 PHILOSOPHY AND PUBLIC AFFAIRS 1, 4 (2005). 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*, pp. 3-18 in LEVINSON, TORTURE. 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* (Oxford UP, 1985).

⁵ 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 CAT], available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

⁶ The reservations that the United States Senate attached to the convention upon ratification are substantial. Among the most consequential are:

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. . . .

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. . . .

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. . . .

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

speaking, to have a more cramped definition of torture than the rest of the civilized world. And those same reservations taint a US federal statute against torture as well.⁷ But there can be no serious legal question *that* torture is prohibited.

There is a serious legal question, however, about what is included within the scope of “torture.” As it turns out, “torture” does not have a clear *legal* profile because no one had systematically tried to define as a matter of law the border between “torture” and “not torture” before. Why not? In international human rights instruments, torture is generally twinned with “cruel, inhuman and degrading treatment.”⁸ And both have always been subject to absolute prohibition.⁹ As a result, while some international court judgments have distinguished torture from cruel, inhuman and degrading treatment, the legal result would have been the same in either case: both run afoul of the law.¹⁰ A more general distinction between the two then seems less

Text of the reservations is available at <http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>. For an account of the reservations made by the United States and their implications for a definition of torture, see Sanford Levinson, *Contemplating Torture* in LEVINSON, TORTURE.

⁷ 18 U.S.C. 2340A(a): 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.

⁸ The twinning is in the very title of the 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. It is also present 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. The European Convention uses the same formulation in Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, arts. 46, 50, 53, E.T.S. No. 5, [hereinafter European Convention on Human Rights or ECHR], *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

⁹ Sandy Levinson believes that the wording of the CAT allows some wiggle room to turn cruel, inhuman and degrading treatment into something other than a non-derogable prohibition (Sanford Levinson, “Remarks on Torture,” presentation at the Association of American Law Schools, 8 January 2005) but Claudio Grossman, one of the members of the Committee Against Torture of the United Nations, present in the audience for the session, argued forcefully that cruel, inhuman and degrading treatment was always non-derogable under the CAT. And the Committee seems to have taken it as such. See the national reports and Committee responses at <http://www.unhchr.ch/html/menu2/6/cat/cats.htm>.

¹⁰ See, for example, *Ireland v. United Kingdom*, (European Court of Human Rights, 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 cruel, inhuman and degrading, but not torture. 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. *Public Committee Against Torture in Israel v. Israel*, 38 L.L.M. 1471 (1999). In both cases, however, the practices were deemed unlawful.

crucial to develop. Why precisely distinguish two legal states from each other when the distinction makes little difference to the result?¹¹

The problem, however, is that the United States *did* separate “torture” from “cruel, inhuman and degrading treatment” when it enacted its own domestic torture law. In 1994, torture was criminalized in American law when practiced by US government agents outside the United States, but cruel, inhuman and degrading treatment was not criminalized along with torture.¹² This presented the possibility, newly seized on by the Bush Administration after September 11, of drawing a close circle around a few practices that would amount to banned torture, while leaving the rest of the legal landscape to the category of “not torture” which was *not* explicitly prohibited under the torture law. Whether conduct amounting to cruel, inhuman and degrading treatment is prohibited elsewhere under American law when carried out by US government agents is at the center of the present legal debate. Practices amounting to cruel, inhuman and degrading treatment are almost surely prohibited when conducted by US agents inside the United States,¹³ but not so clearly prohibited under US law when conducted by US agents acting outside the United States.¹⁴ The consensus about highly coercive interrogation that appeared solid in international law was therefore undermined by the way that the United States wrote the prohibition on torture into its domestic law. And that explains the legal ambiguities of the present situation.

In this Article, I will not mount an argument against torture on legal grounds, but instead on *sociological* grounds. Why not stand on legal terrain to argue against torture? The Bush

¹¹ I owe this line of argument about the twinning of torture with cruel, inhuman and degrading treatment to Sandy Levinson in his remarks at the AALS, *supra* .

¹² 18 U.S.C. 2340A(a).

¹³ The reservations made by the US to the torture convention indicate that the US standards should track American constitutional law under the 5th and 14th amendment due process clauses and the 8th amendment “cruel and unusual punishment” standard. As Seth Kreimer has argued, these standards would in fact prohibit much that would otherwise count as cruel, inhuman and 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 on 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 US agents to carry out cruel, inhuman and 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 Martin Lederman, *Administration Confirms Its View that CIA May Engage in "Cruel, Inhuman and Degrading" Treatment*, at <http://balkin.blogspot.com/2005/01/administration-confirms-its-view-that.html>.

Administration has made clear in a series of legal opinions from its own lawyers that it intends to interpret international law in a cramped manner in the “war on terrorism,” if it in fact takes international law to be binding at all.¹⁵ One can imagine that exploring the obligations that arise directly under the Convention Against Torture, then, will make little headway in this political climate. The extraterritorial application of US domestic law to cover many of the most pressing actual cases involving highly coercive interrogation practices runs into some highly technical issues about precisely who holds formal custody and who controls the territory where such formal custody occurs.¹⁶ Such discussions, crucially important though they are, are likely to be comprehensible only to legal specialists. The present *policy* debate over the acceptability of torture needs to turn on something other than whether there can be legally constructed “torture shelters” and whether government lawyers have taken proper advantage of the loopholes that American law has to offer in creating them. Given the way that American law has been written, it is not so easy to argue that there is already in place an absolute *legal* prohibition on both torture and on cruel, inhuman and degrading treatment as the US “war on terrorism” has gone global.

Legal arguments, even when respectable in technical terms, can run aground on moral resistance from a broader public, however. And the legally constructed torture arguments have already started to meet resistance. A poll recently published by USA Today indicates that in fact large majorities of Americans are not only unwilling to tolerate torture, but are also unwilling to tolerate the precise techniques openly used by the United States in its “war on terrorism,” techniques that it has said are not “torture.”¹⁷ Given that it is always open to an Administration

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 and Robert J. Delahunty to William Haynes II, “Application of Treaties and Laws to al Qaeda and Taliban Detainees.” Draft at 35. 9 January 2002. Available at <http://www.msnbc.msn.com/id/5025040/site/newsweek/> (in 10-page increments).

¹⁶ On these issues, Marty Lederman already performed heroic legal analysis. See his posts at <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-part-i.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, <http://balkin.blogspot.com/2005/01/understanding-olc-torture-memos-coda.html> .

¹⁷ The poll reports that 59% of respondents reported that they would *not* approve the US government torturing *known terrorists* even if those known terrorists “know details about future terrorist attacks in the US” and the government thought such torture was “necessary to combat terrorism.” On the other hand, 65% of those surveyed

to behave more decently than the law allows, an argument outside the technical confines of the law may persuade more readily in the present context, especially with public opinion behind it. I therefore turn to sociology. A sociological argument tries to understand the shape of the actual situation in which a moral agent finds herself, to get the best possible account of the complexity and nuance of the context within which choices have to be made. A sociological argument inquires into whether the distinctions drawn in abstract debate track the actual contexts of decision.

To run this argument, I will deconstruct the nuclear terrorist hypothetical that has convinced so many that torture is thinkable. Why challenge the hypothetical? I submit that the chances that someone will in fact be in a situation like the hypothetical are so vanishingly small that it is perverse to let the extreme and extremely unlikely case drive the policy debate. Taking apart the important moving parts of the hypothetical will allow us to see more precisely why it is a mistake to work logically from an extreme and imaginary case back into actual policy. While hypotheticals may sometimes be useful at clarifying moral values and legal arguments, their value surely depends on the extent to which they track the crucial features of the problem a moral agent faces. To argue from a case that does not track the crucial moral features of the relevant context mistakes the sociology of the issue, and therefore disorients both moral and legal issues as well.

The problem with the nuclear terrorist hypothetical goes to its very core. First, it 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 him against all of Manhattan (and against the whole world), with a

thought it would be acceptable for the US government to “assassinate known terrorists.” Specific interrogation techniques are also put before those surveyed, with the following results:

Interrogation Technique	% who thought it would be wrong
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%

USA Today/Gallup Poll results from a survey of 1,008 American adults conducted between 7-9 January 2005, available at <http://www.usatoday.com/news/polls/tables/live/2005-01-10-poll.htm>.

decision invoking your personal morality on your lonely shoulders. There is no institutional context; neither state nor society appears in this picture. The hypothetical also assumes an extraordinary degree of clarity about the situation in which you find yourself when the decision to torture arises. You know *with reasonable certainty* both that there *is* a nuclear bomb in the middle of Manhattan and that and the bomb *will explode* and *will kill millions* of people absent your intervention. Such certainty about these elements may be hypothetically possible, but it will never really exist. In addition, the hypothetical assumes that this guy you've caught is *the one* (perhaps even the only one) who knows where the ticking bomb is. The "war on terrorism" being what it is, it is highly unlikely that any person faced with the decision to torture will really know whether the suspect before her either has the relevant information or provides the only or best avenue through which to get the information. Finally, the hypothetical assumes that if the captured person gives you the information after being tortured, that the information will in fact be *true* and *useful* in defusing the bomb. And everything we know about torture indicates that the results it produces are highly unreliable.

I want to challenge each of these 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 would be present. 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 – or even to entertain the possibility of – torture. Even if the hypothetical persuades us that torture would be justified in some extreme cases, the "war on terrorism" has not yet and most likely will not present those cases. In fact, the situations in which the actual questions about torture would be (and have been) raised bear *little useful similarity* to this hypothetical. As a result, I will argue, the pitched debate over this hypothetical and its logical entailments mistakes what the real choices are in the present "war on terrorism." We should look instead at the situation in which the United States presently finds itself and assess the arguments for and against torture against that background.

First, however, we should consider why the question of the legitimacy of torture arises now.

The New Torture Debate: Opening Pandora's Box

In June 2004, news leaked¹⁸ about a secret memo concerning the legality of torture written in 2002 in the Office of Legal Counsel within the Department of Justice.¹⁹ The “torture memo,”²⁰ as it came to be called, had been kept secret until after news of the abuses of Iraqi detainees in American custody at the Abu Ghraib prison in Iraq had already become known. When news of the memo leaked, it became clear that the memo argued that “torture” as a legal category included such a narrow range of cases as to hardly exist in any practical context short of death of the person subjected to the questionable treatment:

[W]e conclude that torture . . . covers only extreme acts. Severe pain is generally of the kind that is 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 acts that, though they might constitute cruel, inhuman or degrading treatment or punishment, fail to rise to the level of torture.²¹

Moreover, the memo argued that Congress may have exceeded its constitutional authority by passing the torture statute in the first place, since it could be construed as limiting the President's Commander-in-Chief powers to run the war any way he saw fit.²² Those who might be prosecuted for torture, the memo continued, could avail themselves of the defenses of “state

¹⁸ Dana Priest and R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, WASHINGTON POST, 8 June 2004 at A01

¹⁹ 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 US federal government more generally. Its opinions are considered highly authoritative and are often relied upon heavily in deciding on crucial policy matters. For more, see the OLC's website at <http://www.usdoj.gov/olc/>.

²⁰ Jay Bybee, “Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A.” 1 August 2002. Reprinted in MARK DANNER, TORTURE AND TRUTH (New York Review of Books, 2004) (hereinafter DANNER) at 115-166.

²¹ Bybee in DANNER at 155.

²² Id at 142-149.

necessity” and also of commander-in-chief immunity that would be available to anyone whom the President had authorized to engage in torture.²³ Since the memo provided legal advice to the executive branch on what torture was and by which legal limits the executive branch was bound, the memo had the effect of saying that any interrogation techniques short of this exceedingly narrow definition of torture would pose no legal difficulties. And it even suggested that the President had the broad discretion to permit executive branch officials to engage in actual torture without risk of successful prosecution.

By defining torture so narrowly, the memo gave its legal stamp of approval to a range of potential interrogation techniques that might have seemed to many to be torture. The memo appeared to legalize “torture lite,” a range of techniques that cause serious pain and suffering, but that do not rise to the extreme levels required by the memo’s cramped analysis. By moving the goalposts on what counted as torture, the Bush Administration’s secret memo seemed to have already settled the policy debate about what the US was willing to do to gather information in the “war on terrorism.”

The critical reaction to the OLC memo was immediate and intense. Legal experts, foreign leaders and journalists rose in chorus to condemn the apparent approval of torture.²⁴ At first the Bush Administration tried to neutralize the memo by having the President state that all US interrogators had to “follow the law.”²⁵ Given that “the law” evidently did not rule out much in the OLC’s understanding of it, the administration was eventually pushed into repudiating the

²³ Id. at 149-155.

²⁴ “A broad range of legal experts, including specialists in military law, say they were taken aback by this bald assertion of presidential supremacy.” David G. Savage and Richard B. Schmitt, *Lawyers Ascribed Broad Power to Bush on Torture*, LOS ANGELES TIMES, 10 June 2004, available at <http://www.latimes.com/news/nationworld/iraq/la-na-torture10jun10,1,6396391.story?coll=la-home-headlines>. “The document, on the face of it, is a charter allowing the US president to abuse human rights and ignore domestic as well as international law.” Richard Norton-Taylor, *A Torturer’s Charter: Secret Documents Show That US Interrogators Are Above the Law*, THE GUARDIAN, 12 June 2004. “[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.” Dana Milbank and Dana Priest, *Bush: U.S. Expected to Follow Law On Prisoners: President Is Pressed On Interrogations Memo*, WASHINGTON POST, 11 June 2004 at A06. Available at <http://www.washingtonpost.com/wp-dyn/articles/A32707-2004Jun10.html>.

²⁵ Milbank and Priest, *id.*.

memo altogether.²⁶ Shortly thereafter, the CIA, for whom the memo had been written in the first place, announced that it was suspending its use of harsh interrogation techniques.²⁷ And the OLC was instructed to come up with a new interpretation of the US federal torture statute.

The new OLC memo issued on 30 December 2004 clearly walks back from the extreme analysis taken by the earlier memo.²⁸ As new memo points out in its opening sentence, “Torture is abhorrent both to American law and values, and to international norms.”²⁹ The new memo repudiates the prior legal analysis of torture generally, among other things by indicating that causing physical suffering even without severe pain may rise to the level of torture³⁰ and that prolonged mental harm may encompass a very wide range of later effects.³¹ 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.³² The new memo “supersedes in its entirety” the earlier memo, now claiming that controversial earlier analysis of the outsized powers previously claimed by the President was “unnecessary.”³³ In a dramatic departure from the tone of the earlier memo, the new analysis focuses the attention of those engaged in interrogation on the overall impact of their interrogation techniques on the person being interrogated, rather than, as before, allowing interrogators to seek

²⁶ Mike Allen and Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible*, WASHINGTON POST, 23 June 2004 at A01.

²⁷ Dana Priest, *CIA Puts Harsh Tactics On Hold: Memo on Methods Of Interrogation Had Wide Review*, WASHINGTON POST, June 27, 2004 at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A8534-2004Jun26.html>.

²⁸ Daniel Levin, “Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A.” 30 December 2004. Published on the day of issue at the website of the Department of Justice at <http://www.usdoj.gov/olc/dagmemo.pdf>.

²⁹ *Id.* at 1.

³⁰ *Id.* at 12.

³¹ *Id.* at 14-15. The effects include suffering years later from flashbacks, nightmares, anxiety and disruptions of sleep.

³² For example, torture is not limited to historical techniques associated with the term, (*id.* at 5, footnote 13). The memo indicates that there is no objective way to define severe pain, which must therefore always have a subjective element. The emphasis added marks (*id.* at 8, footnote 18) highlight the subjective element of pain. Post-traumatic stress disorder (*id.* at 14, footnote 25), and suffering years later from flashbacks, nightmares, anxiety and disruptions of sleep qualify as prolonged mental harm under the torture statute (*id.* at 15).

³³ *Id.* at 1.

legal immunity in a pre-approved checklist of techniques that could be used without concern for their individual or cumulative effects.

Even before the new and stunning repudiation of the earlier torture memo, however, the US had always said it would never use torture.³⁴ Though the torture convention is enforced “only” by reporting requirements,³⁵ the enactment of a federal criminal law based on the Convention against Torture (CAT) sets up American domestic criminal sanctions for committing torture.³⁶ Much of the American debate – including the bulk of the two “torture memos” – now centers on what exactly is covered by the term “torture,” but no one in a position of authority has argued that torture is of no moment, or that it should be generally allowed.³⁷

The new memo significantly changes the legal debate over what specific conduct is to count as torture under present American law, but the debate over where to draw the line between

34 This was true even in the OLC legal analysis. The letter written by John Yoo, then with the Office of Legal Counsel, to Alberto Gonzales, then counsel to President Bush, seems to argue that the US could not be held to be bound by a more robust determination of the meaning of torture than that explicitly incorporated into US federal law because the US had entered a reservation at the time of its ratification of the Convention against Torture permitting such a cramped definition. Though the Vienna Convention on Treaties requires that reservations not defeat the object and purpose of the treaty itself, Yoo argued that the object and purpose of the anti-torture convention was kept intact as long as the US has not “reserved the right to conduct torture.” And that, at least, the US did not do. Yoo memo in DANNER *supra* at 111.

35 The “Initial Report of the United States to the UN Committee Against Torture, Submitted by the United States of America to the Committee Against Torture, October 15, 1999,” is highly self-reflective, detailed and clearly willing to contemplate a much broader definition of torture than the Bush administration’s lawyers have seen fit to promote. For the 1999 US report, see http://www.state.gov/www/global/human_rights/torture_toc99.html. The original report, however, was submitted five years late. For the concluding comments of the Committee, including the chastisement for being late, see [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.55.44,paras.175-180.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.55.44,paras.175-180.En?OpenDocument). The Committee then set the next deadline for the US to submit a report at 19 November 2001. But there is no record in the sessions of the Committee against Torture that such a US report was ever filed or examined. See account of the sessions at <http://www.unhcr.ch/html/menu2/6/cat/cats.htm>. The US appears to be late again.

36 18 U.S.C. §2340-1340A. 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. 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).

37 President George W. Bush has shared in 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 (5 July 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 (30 June 2003). Even Alan Dershowitz, who is routinely portrayed as advocating torture in his book WHY TERRORISM WORKS, 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.” He then goes on to explain his proposal for “torture warrants” by saying that he believes 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. Dershowitz, *Tortured Reasoning* in LEVINSON, TORTURE at 266.

“torture” and “non-torture” has the effect of hiding a crucial policy choice under cover of a technical legal debate. We should be asking instead: Under what circumstances should highly coercive interrogation techniques (by whatever label they are called) be “thinkable” options in the “war on terrorism”? I will go on to call those techniques “torture,” though the present debate over what exactly counts as torture (legally speaking) given the United States’ reservations to the Convention against Torture may find some of the techniques I describe below not to rise to the level of “torture.”

As those who have wanted to reopen the debate over coercion in interrogation have argued, however, state officials in extreme cases will be tempted to use extreme techniques regardless of their legal status, and then the question will be whether the law should acknowledge the inevitable and find some way to regulate them or whether the law should stick to principle and refuse to budge from the absolutist approach against extreme coercion.³⁸ As I will argue here, I don’t believe we should concede that state officials would or should be willing to torture, even given the high stakes of the anti-terrorism context. And, as I will show, the challenges presented by the “war on terrorism” are not quite what advocates of the “thinkable” nature of torture say they are.

What we do know already is that the US does appear to be using a variety of highly coercive practices to force information from the thousands of detainees that the US has already imprisoned in the “war on terrorism.” We can therefore see from the practices that have come to light the sorts of circumstances in which the present administration believes that such coercive practices would be justifiable. The disclosure of indefensible methods of detainee treatment revealed in the photographs coming out of the Abu Ghraib prison in Iraq in April 2004³⁹ ignited a heated debate over whether the abuses shown were the result of US policy (as those who read the first OLC torture memo suspected) or were the actions of a “few bad apples,” as the administration suggested.⁴⁰ Subsequent disclosures have revealed that detainees in

³⁸ Alan Dershowitz’s argument has been the first and loudest. See *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (Yale U Press, 2002), chapter 4, *Should the Ticking Time Bomb Terrorist be Tortured? A Case Study in How a Democracy Should Make Tragic Choices* at 131-164.

³⁹ Some of the photographs are reprinted in DANNER at 217-224.

⁴⁰ 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 for their conduct at Abu Ghraib have tried to raise the defense that they were ordered to do the things they were shown doing in now-famous photographs, these defenses have been excluded in courts martial:

Guantánamo, Iraq and Afghanistan have been subjected to sexual humiliation, beaten, menaced by dogs, threatened with infliction of pain, subjected to prolonged periods of solitary confinement, deprived of sleep, exposed to extremes of heat and cold, shackled in painful positions for many hours, and subjected to bright lights and loud music for extensive periods.⁴¹ A number of detainees have been subjected to many, perhaps even all, of these techniques over weeks and months of interrogations.⁴²

The similarity of techniques across different branches of the service and across different types of American military detention centers suggests that it is official policy more than the quirks of individual soldiers that is driving the shocking treatment of detainees,⁴³ but the

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 but not charged in a Pentagon investigation.

"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."

Kate Zernike, *Ringleader in Iraqi Prison Abuse is Sentenced to 10 Years*. NEW YORK TIMES, 15 January 2005.

⁴¹ See the extensive documentation of concrete abuses in Seth Kreimer, "'Torture Lite,' 'Full-Bodied' Torture and the Insulation of Legal Conscience." Draft paper, December 2004.

⁴² A report in the New York Times about the treatment of Mohamed al-Khatani, who is being detained at Guantánamo, indicates that he was injected with a tranquillizer, put into a sensory deprivation suit and then flown in a plane for hours to make him believe that he was being taken to Egypt, where interrogators there famously torture their captives. Unbeknownst to him, al-Khatani was in fact back at Guantánamo where US interrogators participated in the fiction that they were in the Egyptian security services. The published account does not say what US interrogators then specifically did to al-Khatani, except that they employed some of the special-permission techniques that could only be used with Secretary of Defense Rumsfeld's approval. The Times does indicate, however, that al-Khatani was subjected to a forced enema to deal with "dehydration" that had resulted from his long interrogation sessions. Neal A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*. NEW YORK TIMES, 1 January 2004. "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 (see DANNER at 202), which adds further credibility to the New York times report.

⁴³ "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 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*. NEW YORK TIMES, 13 January 2005.

administration has repeatedly denied this. With the publication of a series of memos from the Defense Department, permitting and then withdrawing and then permitting (with individualized approval) certain harsh techniques of interrogation,⁴⁴ however, the fact that unconventional and questionable interrogation techniques have been and probably still are being used by military intelligence no longer is deniable.⁴⁵ Other leaks have indicated that the CIA may have had

⁴⁴ Many of the memos, reports and legal rationales are published in DANNER. Others are available at <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html>.

⁴⁵ The questioning of these practices does not just come from human rights activists. 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 the techniques used by the military at Guantánamo, techniques that included 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. Carol D. Leonnig, *Further Detainee Abuse Alleged: Guantánamo Prison Cited in FBI Memos*, WASHINGTON POST, December 26, 2004; Page A01.

From the FBI emails: "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 circulated within the FBI about military interrogation tactics at Guantánamo included the following 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. . . ." <http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf>. In another email, an FBI agent was clearly disturbed by the fact that the military interrogators had told the detainees that they were FBI personnel, though since crucial bits of 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, <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.

additional and even harsher techniques that it had been cleared to use, such as “water-boarding,” a procedure that causes a person to believe that he is drowning.⁴⁶ The CIA also seems to be using forcible renditions, or transfers of persons from country to country, to take advantage of the more coercive interrogation techniques used in the destination country.⁴⁷ The CIA has also been 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.⁴⁸ And what will the US do eventually

In telling C.I.A. 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 C.I.A. 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*, NEW YORK TIMES, December 14, 2004 at 15.

⁴⁶ It is unclear how many of these practices were affected by the CIA's decision to stand down its edgy interrogation techniques after the first “torture memo” was repudiated by the Bush Administration. Dana Priest, *CIA Puts Harsh Tactics On Hold: Memo on Methods Of Interrogation Had Wide Review*, WASHINGTON POST, June 27, 2004 at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A8534-2004Jun26.html> . But see the earlier account in James Risen, David Johnston and Neil A. Lewis, *Harsh C.I.A. Methods Cited In Top Qaeda Interrogations*, NEW YORK TIMES, May 13, 2004, p. 1.

⁴⁷ In these transfers, a CIA plane is used to take detainees from the countries of their capture to US-friendly countries where torture is practiced and where one suspects that interrogation techniques can be used that are not yet permitted in formal American policy. See Dana Priest, *Jet Is an Open Secret in Terror War*, WASHINGTON POST, 27 December 2004; Page A01 available at <http://www.washingtonpost.com/wp-dyn/articles/A27826-2004Dec26.html>: “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. . . .” .

⁴⁸

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

with all of those who have been squeezed dry of information using methods that produce evidence unusable in any decent court? The intelligence community has proposed to establish long-term detention centers, where already-interrogated detainees can be kept indefinitely without the need for charges, trials or convictions.⁴⁹

The legal debate over coercive interrogation has focused primarily on whether these techniques that seem unquestionably to be part of the Bush Administration's bulked-up response in the "war on terrorism" are torture or whether they are "merely" cruel, inhuman and 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.

These debates and their surrounding revelations opened the Pandora's box of permissible torture. One easy way to close that box is with the obvious response that even President Bush gives on ritual occasions: The US does not use torture. End of discussion. But it does not seem that the discussion has ended there. The first torture memo indicated that the Bush Administration had just contracted the category of "torture" so that what was actually done was not given that label. As a result, torture has become thinkable (even doable) in ways that it was not before. While *official* policy may be that the US never uses torture, the actual practices might well amount to torture on a more robust understanding of the term.

Clearly, there is a move afoot in discussions surrounding the "war on terrorism" to establish the principle that torture is not in fact always a bad thing. This move has happened within the law by simply redefining certain techniques as *not torture*. Outside the law, the move occurs through the discussion of extreme cases like the nuclear terrorist whose hypothetical existence reveals to all that torture *should* be "thinkable." Once the *principle* is established outside the law that there are some cases where torture should be used, there will then be pressures, as indeed there already have been, to consider *legal* exceptions permitting torture.

often used when American interrogators believe that harsh treatment - banned in their own country - would produce results.

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

⁴⁹ "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*, WASHINGTON POST, 2 January 2005 at A01.

Alan Dershowitz's proposal for "torture warrants," in which a judge is empowered to give special permission for interrogators to torture specific detainees under controlled circumstances, is only the most famous one.

The frequent use of extreme hypotheticals that might justify torture in normative discussions is, as I see it, part of the broader discussion that would prepare the ground for formal legal recognition of torture. Given that virtually all of those who believe that torture is sometimes necessary and/or inevitable use variants on the same extreme hypothetical – the nuclear bomb in a major city – there is something important and worth investigating about the hypothetical itself. Extreme hypotheticals on this subject are generally designed to tip the balance in favor of torture, even as those who go down that road ultimately argue that torture should only be allowed in these extraordinary cases. Extreme hypotheticals emphasize the power of consequentialist arguments and signal the justifiable creation of exceptions to the absolutist stance. We therefore need to examine just how the extreme hypotheticals work and what, in fact, they seem to justify.

Unpacking the Torture Hypothetical

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

1. Unlike in the hypothetical, the interrogator is not making an individual decision as an independent moral agent. Instead, 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 directly 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) to follow 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 will be a political judgment about standard operating procedures for a bureaucracy.

2. The judgment to torture will almost surely not be made in a context where the parameters are as clear as those 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 don't get us to the point of authorizing torture even if we are moved to approve of torture in the hypothetical case. And 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, as does the hypothetical. And the interrogator has to be certain, or very nearly so, that the consequences are both immediate and immense. The "war on terrorism" surely poses a generalized, pervasive and serious threat, but interrogators will virtually never be in the circumstance of confronting a certain, monumental and imminent threat.⁵⁰ And generalized, pervasive and serious threats are outside this hypothetical.

3. The hypothetical stipulates that *this person* who is caught and might be tortured actually knows the information necessary to avert the catastrophe. But in the real world of the anti-terrorism campaign, there will often be reasonable doubt about whether the person whom the interrogator has before him is really the one who possesses the information to stop an attack. Even assuming 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 in fact true), even rightly targeted suspects may not know the relevant information about an upcoming attack. Instead, we know that al Qaeda is decentralized and compartmentalized, so even a clear "high-value target" will not necessarily know operational specifics of particular plots. And torturing a detainee, even a "high value" one, only for *general* information or even for information about who *might* have the relevant knowledge is not enough to come close to the situation in the hypothetical. Given al Qaeda's structure and methods of operation, we will almost never know with confidence whether the detainee under questioning actually has the information relevant to preventing an attack.

4. Even if the other conditions of the hypothetical are met and the interrogator tortures to acquire information, the information obtained in such situations may not be *true* or *useful*. The

⁵⁰ If someone is in the position of confronting a certain, imminent and monumental threat, it is in fact unlikely to be an interrogator, who is typically called upon after the fact of a detention, which would take some time to accomplish. Instead, if there is a lone individual confronting a terrorist threat, that person is unlikely to be under standing orders about what to do in the circumstances. The lone moral agent would be in a different situation, one that implicates issues like appropriate criminal defenses, not state policy about interrogations.

hypothetical assumes that the problem is solved once torture produces the 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 tortured out of someone may not be information that actually defuses the imminent threat.

The circumstances that make us so sure about what we would do with the hypothetical of the nuclear weapon in Manhattan, then, do not carry over into any realistic picture of the world in which the actual decisions to torture are made. As a result, a “yes” vote on the hypothetical should not lead any of us to countenance a *policy* of torturing detainees for information in the “war on terrorism” that is presently underway. The real world will always be too far from the hypothetical to allow the hypothetical to guide us. And once we explore the real-world limitations, I suspect that even die-hard consequentialists about terrorism will have serious second thoughts. Or, I will argue, they *should have* second thoughts once the full context of decisions to torture is elaborated.

In the situations in which torture would be actually used – indeed in the situations in which highly coercive interrogation techniques have in fact *already* been used – the specifics of context do not come anywhere close to the extreme case that the torture hypothetical envisions. Agreeing that there may be a hypothetical case in which one could imagine engaging in torture, then, does not tell us much about what the United States should do in the present “war on terrorism.”

Let me take each of these challenges to the hypothetical in turn.

1. Bureaucracy

When an interrogator – a military interrogator, a civilian contractor or an agent of the CIA – faces a detainee, he⁵¹ is hardly alone in the world as an independent moral agent. The

51 I am using the male pronoun in the empirical analysis here not out of unreflective sexism, but because virtually all of the known detainees and most of the known interrogators are men. Using a gender-neutral pronoun would disguise this element of the real world within which these interrogations are done. When women are involved as interrogators, it seems from the cases of abuse that we know of (see, DANNER) 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 at 219, 222 and 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 the high-level policy-making on this issue, and have often been just as tough if not tougher than the men. See, for example, the “legal brief” written by LTC Diane Beaver approving of a variety of harsh interrogation tactics, in

interrogator is usually taking orders 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, then, are precisely *not* like the person in the hypothetical: a free-standing moral agent who is setting the terms of her⁵² own action and who is responsible primarily to her 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 agents in the military or intelligence bureaucracies to use. The decision to torture in the relevant context, in other words, is a decision about what the standard operation procedures should be. Should the US allow those acting in its name and under its authority to use these tactics as part of its routine practices? The tactics might be limited to only a few cases, but they have to be contemplated as routinely available for a *class or category* of cases, otherwise the rule would just pick out a single instance and fail to be 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 US 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 other alternative.” But you can see the problem. It would take thousands of such specific rules to anticipate every situation in which torture might be justified so precisely. And no such system of precise rules would ever be complete.

Let’s try another sort of rule: “If you’ve captured someone whom 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 and it is the approach that seems to have been taken by the Defense Department as it has struggled with this question. Defense Secretary

DANNER at 170. When gender becomes specifically relevant to the analysis or when I am talking about the hypothetical situation, my use of pronouns will change.

⁵² I use “her” here to signal the return to abstract theorizing, as is now the convention in much of the philosophical literature to avoid sexist reference. But the use of “her” to reference the moral agent misses reality in another way: most of those making such decisions are not operating in the singular in any event.

Donald Rumsfeld's memo of 16 April 2003⁵³ indicates that the use of interrogation techniques more harsh than the set he explicitly authorized for general use was only permissible with individualized high-level approval. Torture warrants, proposed by Alan Dershowitz,⁵⁴ have something of the same structure: stop the action, ask permission, and then carry on if allowed.

If we return again to our hypothetical, we can see some problems with this approach already. The hypothetical may tug at us because it poses an imminent threat; asking permission takes time. Even assuming that procedures can be streamlined so that decisions are handed down quickly, there would be enough delay to question whether the danger were imminent enough to warrant torture in the first place. Given time necessary to get them, then, torture warrants may only be available in cases that do not warrant torture. After all, if the nuclear bomb in Manhattan were not going to explode until next week, my guess is that many of us would jump ship on whether torturing someone now were justified in preventing it. Too many other alternatives would have to be tried first before torture would begin to emerge as acceptable.⁵⁵

If immediacy is really crucial to legitimizing torture, as our hypothetical indicates it is, and any rule needs to be able to permit immediate action, perhaps the better rules to develop would be modeled on those that do allow instant violent action in a life-threatening context. We can find a model for such rules by looking at the circumstances under which the police are allowed to use deadly force in the heat of the moment, when there is no time to stop the action to

53 After describing a list of techniques that were authorized for use for "unlawful combatants held at Guantánamo Bay, Cuba," 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 a particular detainee." Memo by Donald Rumsfeld to the Commander, US Southern Command, 16 April 2003. p. 1.

54 Dershowitz, *Should the Ticking Time Bomb Terrorist be Tortured?* in WHY TERRORISM WORKS.

55 The agent giving permission should at a minimum inquire into whether all of the reasonable alternative approaches to finding the information were in fact exhausted, something that could not be done quickly if it were done well. And then the agent giving permission should go on to inquire about the applicability of the next three aspects of the hypothetical to be explored in the sections that follow (imminence and monumental consequences, reason to believe that the detainee has the information, an assessment of whether the information so acquired would be true and useful). But we should be clear that the interrogator cannot wait until the 11th hour when torture would be more likely to be permitted in order to save himself the investigatory work. Suppose however, an interrogator were allowed to file a "just in case" torture warrant a day before the situation that would allow its use, just in case it turns out to be necessary to use torture against a ticking time-bomb terrorist. One can imagine that this would allow more time for the relevant aspects of the problem to be documented, but it would create perverse incentives to start getting permission to torture before real imminence could be demonstrated.

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 use of deadly force and torture has been suggested provocatively by Winfried Brugger in the context of German law.⁵⁶ 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 shouldn't torture 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 fast application under stressful situations, just as torture would, then we should look to how these rules are structured to see how to make such close and nuanced direction work in the context of a bureaucracy.

There are several problems with the general argument. First, not all would agree that torture is of an equal or lesser moral magnitude than killing.⁵⁷ 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 the person grievously wounded for life may be even worse than a clean, fast killing. I doubt we could get the sort of consensus that torture is a lesser evil than killing that we got on our nuclear bomb hypothetical.

Another problem is practical. How should such use-of-force guidelines be framed? The US Justice Department uses an apparently straightforward standard: “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.”⁵⁸ The standard anticipates an immediate threat, like the nuclear terrorist hypothetical. And the standard anticipates that deadly force can be used only to save a life or to present serious physical harm,

⁵⁶ Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 AM. J. COMP. L. 661 (2000).

⁵⁷ In fact, this is the crux of the persuasive argument made against torture by Henry Shue, *Torture*, in LEVINSON, TORTURE at 47-60.

⁵⁸ Department of Justice, Policy Statement: Use of Force, available at <http://www.usdoj.gov/ag/readingroom/resolution14b.htm> .

like the nuclear terrorist hypothetical. Acknowledging the complexity of actual situations in which deadly force may be used, however, the US Department of Justice produced a more elaborated explanation of its standard.⁵⁹ The explanation reveals that the judgment to use deadly force is deeply context-driven, depending on many 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.

⁵⁹ The Department of Justice principles explaining the limits of the use of deadly force noted:

III. Principles on Use of Deadly Force

The Department of Justice recognizes and respects the integrity and paramount value of all human life. Consistent with that primary value, but beyond the scope of the principles articulated here, is the Department's full commitment to take all reasonable steps to prevent the need to use deadly force, as reflected in Departmental training and procedures. Yet even the best prevention policies are on occasion insufficient, as when an officer serving a warrant or conducting surveillance is confronted with a threat to his or her life. With respect to these situations and in keeping with the value of protecting all human life, the 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 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.

The US Supreme Court weighed in on the question in *Tennessee v. Garner*⁶⁰ by ruling that a shoot-to-kill policy that allowed deadly use of force against an unarmed escaping burglar was unconstitutional, but this ruling has been qualified, distinguished and criticized by many courts that have attempted to apply it,⁶¹ including the US Supreme Court itself. Four years later, in *Graham v. Connor*,⁶² the Court reaffirmed that the correct standard to apply was a Fourth Amendment “objective reasonableness” standard in judging excessive force complaints against police, but the Court also indicated how hard it is to define what “objective reasonableness” means: “‘The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,’ however, its proper application requires careful attention to the facts and circumstances of each particular case,”⁶³ the Court opined. Moreover, “[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.”⁶⁴ Having marked some apparent bright lines in *Garner*, the Court then resorted in *Graham* to an “all things considered” reasonableness standard, which 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 use of deadly force instances are investigated after the fact.⁶⁵ This may well make up for the inevitable vagueness in the prospective rules. And over time, it may be possible for those who might use deadly force to anticipate what such review procedures will examine. But if that is the case, it is the training and experience that produces the discipline, not the rules.

⁶⁰ 471 U.S. 1 (1985).

⁶¹ For overviews of the substantial case law on the subject, 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) and 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).

⁶² 490 U.S. 386 (1989).

⁶³ *Id.* at 455, quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

⁶⁴ *Id.* at 455-456.

⁶⁵ For example, see the State of Connecticut’s website which posts all of the Attorney General reports on the use of deadly force by police officers in the state at <http://www.csao.state.ct.us/WhatsNews/deadlyforce.htm>.

The military standing rules of engagement outside the context of self-defense⁶⁶ address the use of force with even vaguer instructions: 1) when feasible give a warning first, 2) use proportionate means and 3) attack only when prudent.⁶⁷ Needless to say, this provides little guidance about when someone might engage in torture if the rules regarding legitimate use of force were to be generalized in that direction. Giving a warning is not necessarily a way to avoid the need to torture but may be part of the torture itself. Torturing only “when prudent” gives little advice about when it should occur. Only the proportionality requirement has enough specificity to give real guidance in any situation where torture may be used. And that will not be enough to limit torture to the few cases where we might otherwise believe it is 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 contemplate.⁶⁸ And 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.

So how, then, did the military *ever* manage to keep interrogations within reasonable bounds before the new debate over question of torture arose? The Army Field Manual (before the Rumsfeld “amendment” allowing exemptions for individual interrogations) lists in some

⁶⁶ The US military does not at the moment even have use-of-deadly-force rules based on a right of self-defense in the standing rules of engagement. “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.” David Bolgiano, Mark Leach, Stephanie Smith and John Taylor, *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rule of Engagement for the Department of Defense*. 31 U. BAL. L. REV. 157, 159 (2002).

⁶⁷ *Id.* at 161.

⁶⁸ A number of the well-known findings regarding heuristic bias in reasoning would be easily applicable here. For a wonderful summary of large bodies of material on the limits of rationality, see Eldar Shafir and Robyn A. LeBoeuf, *Rationality*, 53 ANNUAL REVIEW OF PSYCHOLOGY 491-517 (2002). People are highly risk averse with respect to losses, particularly very big losses with tiny probabilities. This would tend to lead to overestimating threats, particularly ones with potential for catastrophe. Another is that people are worse at estimating what to do when taking more rather than fewer factors into account, but that they are typically highly overconfident with respect to their judgment on the harder problems. This would tend to lead to believing that a hard situation is clearer than it is. “Negative” moods (including fear) tends to lead to overestimating 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 who are likely to be 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. This is not the set of incentives one would want to build into a set of rules designed for interrogation of detainees under precisely these sorts of pressures.

detail the techniques that are permitted, but does not attempt to differentiate *when* techniques of different levels of severity might be used in the way our hypothetical might suggest. All permissible techniques are permissible in *all interrogations*; there are no differentiations made that permit more intrusive techniques to be used only in more high-stakes interrogations. Instead, the Army Field Manual describes an interrogation technique (for example, “change of scenery,” “ego down” and “use of incentives”) and indicates *when* the technique is likely to produce useful information. But the “when” is determined by the psychological type of the detainee,⁶⁹ not by the importance of the information the detainee might provide, the urgency of the situation or the magnitude of the threat averted. All of the permissible techniques, then, are always available, subject to the interrogator’s judgment about what would be effective in a particular interrogation.⁷⁰

The 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, in which soldiers are extensively trained. The Army Field Manual does not separate techniques to be used for “high-value” or “high-urgency” detainees from those to be used with garden-variety detainees, nor do they 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 was 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 original memo written in the Office of Legal Counsel that forwarded a cramped understanding of torture never distinguished between urgent situations of great magnitude

69 See, for example, Army Field Manual 34-52 at 3-15: “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. . . . 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.”

70 Army Field Manual: 34-52 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.”

requiring fast production of information in which harsher methods might be acceptable and less urgent situations of uncertain magnitude in which traditional interrogation methods might be tried first.⁷¹ The OLC memo instead provided a legal basis for adding a set of harsher techniques *across the board* as general tools that could be used 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.⁷²

This analysis does not require the President to distinguish among situations along the lines that the hypothetical suggests. It says only that any technique might be used on an enemy. It implies, for it suggests no limits, that any interrogation conducted in the “war on terrorism” can use any technique. As the memo suggests, the President would even have the constitutional power to order actions forbidden by the torture law – that is, torture itself – if the results gained through such interrogations might prevent future attacks.

Since September 11, the Bush Administration has apparently permitted the use of a set of harsher techniques that were deemed to fall short of the narrow definition of torture,⁷³ and has

71 The memo in general takes the same approach as the Army Field Manual – assessing what counted as torture and not entering 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.

⁷² Jay Bybee, “Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A.” 1 August 2002. In DANNER at 142.

⁷³ At least, the documents disclosed recommending different sorts of policies seem to indicate so. See, for example, Jay Bybee, “Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A.” 1 August 2002. See also Joint Task Force 170, Guantánamo Bay,

tried to cabin them in several ways. First, it tried to segregate the techniques to one physical location (Guantánamo).⁷⁴ Then, it tried to segregate the techniques by permitting only some branches of the US government to use them (CIA instead of DOD).⁷⁵ Then, it tried to limit the

“Legal Brief on Proposed Counter-Resistance Strategies” written by LTC Diane Beaver, 11 October 2002, reproduced in DANNER at 176-7:

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” (or making a detainee believe he was drowning by forcing his head under water). As the Times reported:

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.

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.

James Risen, David Johnston and Neil A. Lewis, *Harsh C.I.A. Methods Cited In Top Qaeda Interrogations*, NEW YORK TIMES, May 13, 2004, p. 1.

⁷⁴ The memos circulating within the Department of Defense about appropriate interrogation techniques indicated that certain ones were only approved for use at Guantánamo. See, for example, Memorandum from Donald Rumsfeld for the Commaner, US Southern Command, 16 April 2003, Re: Counter-Resistance Techniques in the War on Terrorism, reprinted in DANNER at 199: “Use of these techniques is limited to interrogations of unlawful combatants held at Guantánamo Bay, Cuba.” The techniques included “removing a 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 were interrogating him,” and “isolating the detainee from other detainees . . .”

⁷⁵ The original torture memo produced by the OLC was written to provide legal guidance to the CIA. That memo not only defined virtually all interrogation techniques under consideration as not rising to the level of torture, but also argued that Congress had acted unconstitutionally when it enacted the Torture Act in the first place because the Torture Act constrained the president to conduct a war any way he saw fit pursuant to the commander-in-chief clause of the Constitution. In DANNER at 146-149. In addition the OLC memo argued that personnel who were carrying out direct orders of the president could avail themselves of a defense either of state necessity or of commander-in-chief immunity. In DANNER at 149-155. The OLC 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. James Risen, David Johnston and Neil A. Lewis, *Harsh C.I.A. Methods Cited In Top Qaeda Interrogations*, NEW YORK TIMES, May 13, 2004, p. 1. Legal guidance for the Department of Defense was provided in the Working Group Report on Detainee Interrogations in the Global War on Terrorism, 4 April 2003, reprinted in part in DANNER at 187 and reproduced in full at <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf>. Though the latter report duplicated the OLC analysis in large measure, it also used more explicitly a risk-benefit analysis on the acceptability of any particular interrogation technique: “any decision 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.” In DANNER at 192. The legal analysis in the DOD Working Group report

techniques by requiring those who might use them to seek specific permission against specific detainees.⁷⁶

But, as it turns out, all of these attempts to confine techniques to specific places and specific interrogations that come close to torture have not worked. Instead, the reports on detainee abuse have concluded that there has been a general “migration” of the newly sanctioned harsh tactics from the limited field where they were initially authorized to a broader field of engagement.⁷⁷ In particular, Major General Geoffrey Miller had been directing interrogations at Guantánamo where the detainees had already been determined not to be subject to Geneva Convention protections, but in August 2003, he was sent to Iraq to “exploit internees rapidly for actionable intelligence.”⁷⁸ Not surprisingly, he took the techniques he was using in Guantánamo with him even though detainees in Iraq were supposed to be protected under the Geneva Conventions and therefore treated better than the Guantánamo detainees.⁷⁹ After Miller’s visit to Iraq, many of the same abuses as were alleged in Guantánamo surfaced in Iraq. There have

concluded that certain detainees who are “unlawful combatants” may be outside the protections offered by the Geneva Conventions, that “Customary international law does not provide legally enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States” and that “The 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.” In DANNER at 194. Though the memo went on to say that the Convention on Torture *did* apply to these detainees, the memo interpreted the Convention’s requirement that detainees not be subject to “cruel, inhuman and degrading treatment” to mean that pain or harm could not be inflicted “without a legitimate purpose.” In DANNER at 194.

⁷⁶ After describing a list of techniques that were authorized for use for “unlawful combatants held at Guantánamo Bay, Cuba,” 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 a particular detainee.” Memo by Donald Rumsfeld to the Commander, US Southern Command, 16 April 2003. p. 1.

⁷⁷ See Final Report of the Independent Panel to Review DOD Detention Operations (the Schlesinger Commission) at <http://www.govexec.com/pdfs/abughraibfinal.pdf> which observed that “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.” Report at 11. See also the articles by Seymour Hersh in the New Yorker quoting military and intelligence sources as saying that the newly authorized techniques quickly migrated throughout the American anti-terrorism effort, articles collected in SEYMOUR HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

⁷⁸ Final Report of the Independent Panel to Review DOD Detention Operations (the Schlesinger Report), Reprinted in DANNER at 329, 334.

⁷⁹ “Operation Iraqi Freedom . . . is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war.” *Id.* at 375.

since been credible reports that interrogations conducted in Afghanistan have also used some of these same, more coercive interrogation techniques.⁸⁰

As any student of bureaucracy will know, this is exactly what one would expect. Someone trained with specialized knowledge will tend to use that knowledge when moved to a new post. And, particularly within the military, the rotation of troops virtually guarantees that those with this knowledge will be tempted to use it outside the restricted zones where the techniques were initially authorized. The Abu Ghraib prison scandal resulted at least in part from the Guantánamo procedures being used outside their area of initial approval. Others 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 operation. And, in fact, soldiers who witnessed what the CIA was allowed to do in the middle of this same “war on terrorism” were apparently tempted to believe that they were allowed to do the same.⁸¹

As the actual experience with creating new rules of engagement in interrogations has already shown us, then, torture (or coercive methods of interrogation that fall short of torture) authorized within the sprawling bureaucracy that is the US military and intelligence community will soon be spread farther than its initial authorization envisioned. Attempts to limit coercive interrogation techniques to particular places, times or groups of detainees have not worked to date. It is hard to imagine that attempts to cabin more extreme forms of torture will be any more effective. Decisions to torture in the “war on terrorism” will never take the shape of the lone moral agent wrestling with the lone nuclear terrorist. Instead, they will be interpretations of standard operating procedures that, if precisely defined (which they may well not be), cannot be easily confined to one place and one situation. Unlike the lone moral agent up against the lone terrorist in Manhattan, the decision to torture as a matter of policy will always be subject to the imprecision and contagion of institutional contexts.

⁸⁰ 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 the Iraqi war. 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 Guantánamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.” *Id.* at 337.

⁸¹ According to the Schlesinger Report, the CIA operated within DOD facilities in Iraq and was allowed to use different rules than the DOD interrogators. There was no formal agreement between DOD and CIA about how the treatment of detainees was to be handled, including with respect to interrogations where different rules were authorized. “. . . [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 73. DANNER at 368.

2. *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 immediate. There is, in addition, an implicit third criterion without which these two cannot be evaluated: We must be *certain*, or at least reasonably so, that the threat is both immediate and momentous. I suspect that public support for torture in the hypothetical case would decrease if we were talking about a mere conventional explosive, or about a threat more remote in time. And public support for torture would decrease to the extent that none of these things is known for certain.

a) Momentous Consequences

Debunking the likelihood that one would face a terrorist with highly lethal weapons of mass destruction capable of inflicting mass casualties turns out to be relatively easy. As it turns out, the risks of terrorists getting hold of weapons of mass destruction – the usual toxic ingredient in the extreme torture hypotheticals – 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.⁸²

⁸² As the Washington Post reports about 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.

Though 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 can cause. The chemical weapons that one can realistically imagine al Qaeda being able to make would cause little damage; really harmful chemicals pose enormous scientific and logistical challenges to their successful delivery.⁸³ 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 very difficult to make ones that carry high-level lethal force.⁸⁴ In all of the cases

Dafna Linzer, *Nuclear Capabilities May Elude Terrorists, Experts Say*, WASHINGTON POST, 29 December 2004 at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A32285-2004Dec28.html>.

⁸³ As the Washington Post reports 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*, WASHINGTON POST, 31 December 2004 at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A37519-2004Dec30.html>.

⁸⁴ As the Washington Post 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.

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.⁸⁵

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 likely magnitude is much smaller than in the hypothetical. If one is a pure consequentialist, then 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 likely harm are also likely to be much less certain in any actual case than in the hypothetical.

b) Immanence

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 Ressam⁸⁶ and the attempted attack on the Paris-to-Miami flight of American Airlines on which

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

John Mintz, *Technical Hurdles Separate Terrorists From Biowarfare*, WASHINGTON POST, December 30, 2004; Page A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A35011-2004Dec29.html>.

⁸⁵ I have, of course, not shown that WMD terrorism is impossible, only that the catastrophic attacks that the hypothetical feeds on are the least likely sorts of attacks. This is not a reason for complacency; *someone* in a high-level position should monitor these risks to see if they change. And taking defensive action that makes the acquisition of WMD by terrorists less likely is also sensible. But on the extreme consequentialist analysis presupposed by the hypothetical, however, permitting torture to stop an imminent catastrophic attack requires a much greater likelihood of mass casualties than seems to be likely as I write.

⁸⁶ The factual background of the case is conveyed well in a Frontline special produced by PBS called “The Trail of a Terrorist,” outlining how the Algerian-born Canadian resident was able to cross the US-Canadian border with a trunk full of explosives. See also Phil Hirschhorn, *Boyhood Friend Fingers Defendant in Y2K Bomb Plot*, CNN.COM, <http://www.cnn.com/2001/LAW/06/28/millennium.bombing/> (July 2, 2001).

Richard Reid was planning to detonate explosives in his shoes.⁸⁷ 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 as well. Neither case presented the opportunity for a debate over the use of torture.

Instead, the use of coercive interrogation techniques has been justified in cases where there *may* be a plot underway, but 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 original torture memo produced by the Office of Legal Counsel, 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 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 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.⁸⁸

⁸⁷ See Jason Carroll, *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/usreid11703gsentm.pdf>.

⁸⁸ [emphasis added]. Jay Bybee, "Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A." 1 August 2002 at 33. Also in DANNER at 144.

In short, the original OLC memo justified using coercive interrogation techniques right up to the edge of (a very limited view of) torture against al Qaeda suspects on the basis of an assessment of what al Qaeda had done in the past (which makes the techniques sound rather like punishment) or on an assessment of motivation of what al Qaeda might do in the future (they “seek to continue” to carry out such attacks, which justifies treating every al Qaeda member as if such an attack were always possible). There is no attempt in the memo to pick out particular imminent situations where harsher-than-normal techniques might be particularly justifiable.

c) Certainty

Suppose that you were faced with the decision to torture that the hypothetical suggests, in the case where the nuclear terrorist had a bomb in Manhattan. But suppose further that you got 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 translating a document that literally said that “the chicken will lay the egg at 3 o’clock” and your intelligence services have told you that they think that “egg” is a code for a nuclear weapon. Or suppose instead that you’ve spotted a threat to detonate a nuclear explosion in Manhattan on an Islamist website thought to be linked to al Qaeda. What if a detainee himself had bragged that he had the power to set off a nuclear weapon in Manhattan, but you were not sure about his capacity given that he was already locked up? Would you still torture in any of these cases?

As with the problems in drafting standard operating procedures, there is a great deal of real-world evidence that tells us that practical situations in which the decision to torture will arise will never be as clear as the hypothetical. One might well hope that the US government knows far more than it is saying, but from what has been publicly disclosed, the government has found it generally impossible to tell the details of a plot with any certainty before it is launched. Even in those few cases where the government has had information that is 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.⁸⁹ Given that none of the

⁸⁹ The US 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;

raised color alerts since September 11 has been accompanied either by a real terrorist attack⁹⁰ or by public evidence that an actual plot was foiled,⁹¹ we have to guess that information about time, place and the anticipated levels of destruction will never be as clear in the “war on terrorism” as they are in the hypothetical.⁹²

Instead, the evidence we have on the uses of coercive interrogations in the “war on terrorism” suggest 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 ticking time bomb terrorist. The hypothetical envisions that the person making the decision

163 individuals have been convicted or have pled guilty in the United States, including shoe-bomber Richard Reid and “American Taliban” John Walker Lindh.

Report from the United States to the United Nations Counter-Terrorism Committee, April 2004, available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/313/35/PDF/N0431335.pdf?OpenElement> .

⁹⁰ The heightened color alert targeted on New York City and Newark, NJ in summer 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 11 September 2001. Dan Eggen and Dana Priest, *Pre-9/11 Acts Led To Alerts: Officials Unsure Spying On Buildings Continued*, WASHINGTON POST, August 3, 2004 at A01. available at <http://www.washingtonpost.com/wp-dyn/articles/A35466-2004Aug2.html>. Not surprisingly, then, nothing happened.

⁹¹ 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, interrupted as it was being attempted, not by intelligence services, but instead 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*. LOS ANGELES TIMES, 24 October 2004, available at <http://www.latimes.com/news/nationworld/nation/la-na-terror24oct24.1.3895690.story?coll=la-home-headlines>. See also John Mintz, *Guantánamo Spy Cases Evaporate: Chaplain and Arabic Translator Are Now Facing Only Lesser Charges*, WASHINGTON POST, 25 January 25 2004; Page A03. See also Dahlia Lithwick, *Trials and Terrors: These are our banner terror trials?* SLATE April 16, 2004 available <http://slate.msn.com/id/2098948/>. See also Siobhan Roth, *Material Support Law: Weapon in War on Terror*, LEGAL TIMES, 9 May 2003, available at <http://www.law.com/jsp/article.jsp?id=1051121856896> .

⁹² It is interesting to note that in many European cases where alleged terrorists were apprehended, there was evidence sufficient to present to a court of the detailed nature of the plot for which the defendants were arrested. See for example, the German prosecutions that provided substantial evidence that the two men prosecuted had been concretely involved in the 9/11 plot. The trials were thwarted by the refusal of the American government to provide potentially exculpatory information from high-level al Qaeda suspects in US custody. Craig Whitlock, *Germany Struggles To Win 9/11 Cases*, WASHINGTON POST, 13 December 2004 at A01 available at <http://www.washingtonpost.com/wp-dyn/articles/A59917-2004Dec12.html>. 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*, INTERNATIONAL HERALD TRIBUNE, 4 January 2005 at 3. By contrast, in the American cases, contributing “material support” to terrorist organizations has typically been alleged, without any evidence of a particular plot that has been foiled. *supra* [previous footnote]

to torture already knows what most American investigators set out to find with their coercive techniques.

American intelligence has had a bad track record of late in pinpointing threats. The African embassy bombings, the Cole attack and September 11 itself all came as a shock, despite all of the generalized warnings. There were no weapons of mass destruction stockpiled in Iraq; Osama bin Laden is still at large. The discovery of the millennial 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 they have against him (which consist, by the way, largely of his own statements and the statements of those who have been similarly subjected to highly coercive interrogations).⁹³ 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. Richard Reid, the "shoe bomber," was caught by fellow passengers as he tried to light his shoes in the airplane. Since September 11, the only publicly foiled terrorist plots involving state intelligence services can be attributed to our European allies who have all foresworn torture.⁹⁴

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 don't (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, while not knowing the crucial details it would make sense to torture someone to get. An interrogator in the "war on terrorism" is far more likely to

⁹³ In fact, the government seems to have changed its story of the plot that José Padilla is now implicated in. José Padilla is the US citizen labeled an "enemy combatant" because the government claimed that he was planning to detonate a "dirty bomb." He has been held without trial or charges and for more than two years without counsel. On the eve of the Supreme Court decision that might well have freed him, the Justice Department released a document claiming that Padilla had instead planned to blow up apartment buildings in New York City using the natural gas lines coming into those apartments. See Lexie Verdon, *Padilla Targeted High-Rise Apartments*, WASHINGTON POST, June 1, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A6612-2004Jun1.html> Needless to say, that is a very different allegation, and one that, while still serious, takes his case out of the ticking nuclear bomb category.

⁹⁴ For example, the plot to blow up the American embassies in Paris and Rome were foiled by French and Italian police. The plot to blow up the National Court in Madrid was foiled when an associate of the chief plotter confessed to police.

have vague and general information – so that torture is tempting because it would enable the interrogator to figure out whether there is a real threat in the first place. From what we have seen, coercive interrogations have not generally been used to ward off an attack whose precise coordinates are already known. But using torture to discover whether there are threats in the first place is exactly *not* the situation in the hypothetical. The hypothetical limits torture to cases where the torturer knows precisely what information he needs and precisely what threat exists. The real world evidence suggests that coercive interrogation is used to determine whether there is any planned attack at all. 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 certainty, immensity and immediacy in the nuclear bomb hypothetical carries us a long way in the justification of torture. As soon as these critical elements of the hypothetical go soft so that we aren't really sure that there *is* a nuclear weapon in Manhattan or that it *would* go off within hours, or that it *would* have such a massive destructive effect, then doesn't the case for torture look less strong? Can you justify torturing someone for information if there *might* be a nuclear weapon or if it *might* go off within hours? Can torture be justified to find out *whether* there is a threat and not just *how to stop* an existing one? Once we get to these more highly speculative, but more realistic cases, the argument for torture becomes impossibly weak.

3. Identity

The hypothetical assumes that the person the interrogator has before him is precisely the one who knows the secrets that, if disclosed, would defuse the bomb. But what if the interrogator doesn't 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 latter questions are the real-world ones that seem to be most likely to arise in the concrete interrogation settings that we know about from the “war on terrorism.” 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 of about 11,000 detainees held at one time in March 2004.⁹⁵ 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 in the "war on terrorism" that may be cooperating with US intelligence services. Another report indicated that the US held in detention abroad about 9,000 persons in May 2004, of whom about 8,000 were in Iraq.⁹⁶ Do we really believe that all of these detainees have relevant information of the sort that would permit 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,"⁹⁷ it turns out that later analyses of the credentials of those imprisoned there were more 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 Lieutenant Colonel Thomas 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."⁹⁸

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 in fact seem to have wound up in entirely the wrong place. Already in March 2002, the intelligence officers working Guantánamo realized that they didn't have enough information on most of the detainees to fill in the one-page report that was required to certify that the detainee was involved with terrorism.⁹⁹ Of the more than 600 men¹⁰⁰ imprisoned under harsh conditions

⁹⁵ Schlesinger Report in DANNER at 335.

⁹⁶ Dana Priest and Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASHINGTON POST, May 11, 2004 at A01.

⁹⁷ Sue Anne Pressley, *Preparing For Role In War On Terror; Navy Base in Cuba To House Taliban, Al Qaeda Detainees*, WASHINGTON POST, 19 January 2002 at A12. ("the 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.").

⁹⁸ Tim Golden, *Battle over Guantánamo: U.S. Officials Divided*, THE INTERNATIONAL HERALD TRIBUNE, October 26, 2004 at p. 2.

⁹⁹ As reporter Tim Golden wrote:

at Guantánamo, intelligence officials estimated that at most two dozen had any useful information at all.¹⁰¹ And none were high-level al Qaeda operatives.¹⁰²

And yet, it was at Guantánamo that Secretary of Defense Donald Rumsfeld first authorized the use of particularly coercive interrogation techniques. The techniques were approved in a memo of April 2003,¹⁰³ even though it had apparently been known for more than a year that the vast majority of the detainees had little to no intelligence value. And the techniques involving sexual humiliation, isolation, “stress positions” and being subjected to extremes of heat and cold seem to have clearly been used since that time.¹⁰⁴ Even in December 2004, fresh allegations of the use of coercive techniques were forthcoming.¹⁰⁵

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.

Tim Golden, *Battle over Guantánamo: U.S. Officials Divided*, THE INTERNATIONAL HERALD TRIBUNE, October 26, 2004 at p. 2.

¹⁰⁰ 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 hover close to 600, but there are constant releases and additions to this number so that the total number of detainees imprisoned overall at Guantánamo is probably several hundred more than that constant total who have been held in Guantánamo at some point or other.

¹⁰¹ According to the New York Times:

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 rank 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 — are sworn Qaeda members or other militants able to elucidate the organization's inner workings.

Tim Golden and Don van Natta, *US Said to Overstate Value of Guantánamo Detainees*, NEW YORK TIMES, 21 June 2004.

¹⁰² *Id.*

¹⁰³ Memorandum for the Commander, US Southern Command from Secretary of Defense, 16 April 2003, reprinted in DANNER at 199.

¹⁰⁴ Four British detainees (the “Tipton Four”) who were eventually released from Guantánamo and allowed to go free once they got back to Britain have alleged that they were treated harshly while at Guantánamo, including

And what information did the Guantánamo interrogations produce? Though the Bush Administration claimed a great success, those involved in the interrogations seem to have concluded otherwise. A number of intelligence officials said that the Bush Administration had “wildly exaggerated” the intelligence value of the Guantánamo interrogations, claiming that not a single terrorist attack had been prevented by information obtained through the interrogations.¹⁰⁶

In Iraq, the use of coercive interrogation techniques seemed to range even more widely across an even larger variety of detainees. At the Abu Ghraib prison alone, where the most highly publicized abuses occurred, the Jones/Fay Investigation concluded that in fall 2003, some 4000-5000 prisoners “with potential intelligence value” were being held.¹⁰⁷ As the insurgency picked up and it was clear that US 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:

solitary confinement, beatings and endless interrogations. For their stories, see David Rose, *Inside Guantánamo: How We Survived Jail Hell*, Sunday Observer, 14 March 2004, Part I available at <http://www.guardian.co.uk/guantanamo/story/0,13743,1169178,00.html> and Part II available at http://observer.guardian.co.uk/uk_news/story/0,6903,1169122,00.html.

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.

For the complaint filed by the Tipton Four against Secretary Rumsfeld and others, see <http://news.findlaw.com/hdocs/docs/terrorism/rasulrums102704cmp.html>. The complaint alleges:

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, 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.

¹⁰⁵ Vikram Dodd and Clare Dyer, *Guantánamo torture and humiliation still going on, says shackled Briton*, THE GUARDIAN, December 11, 2004

¹⁰⁶ Martin Bright, *Guantanamo has 'failed to prevent terror attacks'*, THE GUARDIAN, 3 October 2004, available at <http://www.guardian.co.uk/guantanamo/story/0,13743,1318702,00.html>.

¹⁰⁷ LTG Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, in DANNER at 418.

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 August to review prison interrogation procedures. Rumsfeld and Cambone went a step beyond Gitmoizing, however; they expanded the coverage 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.¹⁰⁸

But were the harsher techniques used on only 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 before the harsh techniques were used that those abused would have the sort of relevant information that the hypothetical imagines. While some officers claimed that the Iraqi interrogations paid off in valuable intelligence,¹⁰⁹ other reports indicated that many of the detainees who were abused had no intelligence value at all.¹¹⁰ In fact, US troops seem to have had a policy of detaining all of the men who could be found in the vicinity of someone they were in fact looking for, a policy attributable both to the lack of language abilities of 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

¹⁰⁸ SEYMOUR HERSH, CHAIN OF COMMAND at 59.

¹⁰⁹ "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." 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*. LOS ANGELES TIMES, May 15, 2004 at 1.

¹¹⁰ For example, among those Iraqis shown pictured in the photographs of naked pileups at Abu Ghraib prison, only two were ever interrogated and none were found to be of “intelligence value.” Richard A. Serrano, *The Conflict in Iraq: Abused Iraqi Detainees Said to Hold No Intelligence Value*, LOS ANGELES TIMES, 4 August 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.”)

Committee of the Red Cross, in a highly critical report given to US authorities in February 2004, noted that “between 70% and 90% of the persons deprived of their liberty in Iraq had been arrested by mistake.”¹¹¹ Not all of those detained in Iraq were interrogated but some of the most egregious abuses against detainees occurred outside of dedicated times for interrogation.¹¹² 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 “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.¹¹³

¹¹¹ ICRC reports are, as a general rule, not published. They are issued only to the detaining authority of the prisoners that they visit. This particular report, however, was eventually leaked. See 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. Available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf at 8.

¹¹² The ICRC report documented:

- 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
- physical or psychological coercion during interrogation to secure information
- 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. And this was in a population where 70-90% of those detained were mistakenly arrested.

¹¹³ *Id.* at 11.

Since we know from the Jones/Fay Report investigating abuses at Abu Ghraib that about 4,000-5,000 detainees were considered to have “intelligence value,”¹¹⁴ the population exposed to these techniques¹¹⁵ was still no doubt quite large. And it is probably not the case that all of them would have met the “possessing narrowly relevant information” test that the hypothetical seems to envision.

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) or Ramzi Binalshibh (who was behind several prior attacks against American targets), Abu Zubaida (bin Laden’s most senior lieutenant in captivity) or Nurjaman Riduan Isamuddin (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 operated. We know that they are in US custody (probably CIA custody) somewhere, and some sources have claimed that they have been interrogated using the most aggressive methods available.¹¹⁶ Surely these detainees, above all others, are the closest candidates to the hypothetical and therefore the most likely to be subject to “justifiable” torture. Aren’t they?

From all we know about al Qaeda and how it operates, however, much of the operational information that would be relevant to exposing and thwarting an ongoing attack would not in fact be known by those that high up in the organization. Footnotes in the 9/11 Commission Report make clear that these high-level al Qaeda operatives did have detailed knowledge of already completed operations (like 9/11 in the case of KSM). But would gathering knowledge about

¹¹⁴ *supra*

¹¹⁵ The more specific techniques that the Red Cross documented during Coalition Force interrogations in Iraq included: hooding, handcuffing with very tight hand cuffs 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, being forced to stay in stress positions for prolonged periods. The ICRC reported that these methods were used “by the military intelligence in a systematic way.” ICRC report at 12.

¹¹⁶ James Risen, David Johnston and Neil A. Lewis, *Harsh C.I.A. Methods Cited In Top Qaeda Interrogations*, NEW YORK TIMES, May 13, 2004, p. 1.

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 suggest would be necessary.

What about future attacks? Here, there is no doubt much that those of us without security clearances cannot know. But, from what seems to be public knowledge about al Qaeda attacks, those high up in the organization may give general permission for a major attack, but the operational details (which would be the ones most crucial to know to actually foil an attack and save 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.¹¹⁷ What one would get from “high value” targets, then, may not be operational information about specific attacks that would enable authorities to directly intervene to stop them, but instead general operating procedures and lists of participants in the networks, who in turn might be the ones who have the information that might stop an attack. Does the torture hypothetical permit torture in order to get *general* information or the names of those who *might* have the 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 the sort of information that would prevent an imminent attack, 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. The hypothetical imagines a lone terrorist who is the only one with information. Moreover, the lone terrorist has no accomplices or associates who could modify the plot upon the lone terrorist’s capture. But 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 the others are likely to scatter and postpone the attack (or speed it up so that any interrogation is unlikely to intercept it). For example, in the case of the bombings of the two American Embassy in Kenya and Tanzania, the

¹¹⁷ In the two cases about which we know the most because they were the subject of public trials and therefore involved the presentation of large amounts of public information, the Millennial Bomber case and the African Embassy bombing plot, those who would have been had the relevant and detailed knowledge to prevent the actual attack were only one level above those who carried out the attacks as the suicide bombers. See PBS Frontline, “Trail of a Terrorist” for the Millennial Bombing evidence and the US v. Osama bin Laden transcript on file with author for the details.

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.¹¹⁸ Even then, the plot could have been diverted or postponed had it been probable that it would have been intercepted or had someone been captured. Even assuming that interrogators have before them someone who did at one point have the relevant operational knowledge, it may well be the case that by the time of interrogation the knowledge is already obsolete because of the actions of their co-plotters.

Which brings us to the question of how long coercive interrogations can last. The high-value targets against whom highly coercive interrogation techniques have been brought to bear have been in custody now for two to three years, and 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 indirectly through enabling investigators to track down others who may have more current information. There should come a point when any justification for highly coercive interrogation techniques of someone in captivity for years disappears entirely. But from all those of us without security clearances can tell, the interrogations continue.

From what we have seen of interrogation practices in the “war on terrorism,” then, coercive interrogation practices have been used against a large number of detainees who never had relevant information in the sense required by the hypothetical. And even among high-value detainees, the period within which their knowledge would have been relevant to stopping an actual attack must have long since expired, assuming that they had relevant information when they were captured years ago. 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.

4. 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

¹¹⁸ See transcript of trial, the US v. Osama bin Laden, edited version available through author.

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.

So – does it? All of the available evidence indicates that, while torture may on occasion produce true and useful information, it does not do so reliably enough to count on. A recently released CIA manual from the 1960s that presented "basic information about coercive techniques available for use in the interrogation situation" 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."¹¹⁹

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 too big so that had to be held in place constantly, and sensory deprivation. Threats of death, however, were considered "worse than useless."¹²⁰ 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 to not produce actionable intelligence.

Other sources bear this out. Seymour Hersh quotes Willie Rowell, who worked in Army intelligence for 36 years, and who said that the use of force or humiliation with detainees is counterproductive:

¹¹⁹ Walter Pincus, *Iraq Tactics Have Long History With U.S. Interrogators*, WASHINGTON POST, June 13, 2004 at A08.

¹²⁰ *Id.*

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.¹²¹

In an article pointing out that some of the crucial the evidence that there were weapons of mass destruction in Iraq was acquired through torture, Ken Gude noted:

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.¹²²

A study of transcripts of American Air Force personnel captured during the Korean War conducted by Albert Biderman showed that methods of psychological manipulation falling well short of torture were much more effective than either threats or violent methods in getting prisoners of war to talk.¹²³ In France, where torture had a long practice in the courts, there were debates over whether it could produce truth until the 18th century produced a consensus that the practice should be stopped, at least in part because it was not effective.¹²⁴

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 led inexorably to the defusing of the 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 evidence

¹²¹ Rowland quoted in HERSH at 66.

¹²² Ken Gude, *They Got What They Wanted: The Folly of the Bush Administration's Torture Policy*, THE PROGRESS REPORT, 5 August 2004, available at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=134740>. He 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 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]."

¹²³ Albert D. Biderman, *Social-Psychological Needs and "Involuntary" Behavior as Illustrated by Compliance in Interrogation*. 23(2) SOCIOMETRY 120-147 (1958) at 140-141.

¹²⁴ LISA SILVERMAN, *TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE*. (University of Chicago Press, 2001.)

that could tell whether information elicited through torture were reliable, would one really have to torture to get the information in the first place?

The Irresponsible Hypothetical

Though at least one commentator has said that it would be “irresponsible” not to be willing to torture in situations like the hypothetical,¹²⁵ using extreme hypotheticals to guide our thinking in whether torture is justifiable as a matter of policy seems to me to be 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 does not tell us much about the real moral issues at stake because it fails to track many of the important features of the world that would bear on any real decision. Knowing what one would do in the hypothetical case doesn’t answer what one should think 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 whitewashed of all other crucial factors and tells us nothing more than what we already knew – that a tiny risk of catastrophe can swamp all other factors in moral judgment.¹²⁶ The torture hypothetical does not take into account any of the other factors that would be present in a real moral choice about whether to have a torture policy. The hypothetical case of the nuclear terrorist in Manhattan with the bomb set to go off is likely to get even the most principled objector to agree that torture is *sometimes* justifiable, but the question then is: so what does that tell us about the situation that we actually confront?

The “war on terrorism,” or at least what is publicly known about it so far, provides the present context within which decisions to torture, or to use highly coercive interrogation techniques, are being made. We have seen that there has been a persistent tendency on the part of the Bush Administration to use highly coercive interrogation techniques in situations that depart rather dramatically from what the hypothetical suggests would generate approval for torture.

First, 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

¹²⁵ Posner in LEVINSON, TORTURE at 295.

¹²⁶ Shafir and LeBoeuf, *supra* at 496, discussion of “loss aversion.”

reserved for situations that approximate the nuclear terrorist. Even where the aggressive techniques have been limited to permission-only usage, they have migrated from the contexts in which they were initially approved (e.g. at Guantánamo) to contexts for which they were not designed (e.g. general treatment of detainees in Iraq, even outside the context 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.

Then, 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 attack. Instead, the techniques have been used much more generally, to find out *if* there are any plots or *if* the person being detained has relevant information. Coercive interrogations, then, 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 seem to have produced information that has stopped any particular terrorist attack in an advanced stage. Or, at least there has been no publicity of such a great success of the coercive interrogation program. Information from coercive interrogations has filled in the details of the plot behind 9/11 and has been lauded for leading to the arrest of others high up in the al Qaeda network who, based on their past records, might well still be up to no good. But much of the evidence we do have from Guantánamo and from Iraq is that the interrogations largely produced information that was not of much operational value in preventing particular attacks. At best, it provided general information about the future or concrete information only about the past.

If these are the circumstances in which highly coercive interrogation techniques have already been used, then would it make sense to believe that the very people who designed and presided over the implementation of this policy ought to be allowed to extend it into even more questionable techniques? After all, some of the techniques already in play fall just short of torture as it is – and some of them are clearly on the wrong side of any line that might be drawn between torture and “merely” cruel, inhuman and degrading treatment. The United States has, in fact, already been engaged in a large experiment to see what results torture produces and whether torture can be used in the narrowly tailored way suggested by the hypothetical. What

careful observers can see from the results thus far, in an entirely unhypothetical way, is that this experiment has gone badly wrong.

Appendix

Links to the Leaked and Declassified Documents

Memos from the Office of Legal Counsel

Memorandum from Jay Bybee, assistant attorney general, Office of Legal Counsel, to Alberto Gonzales, White House Counsel, on “Standards of Conduct for Interrogation” (a.k.a. “the torture memo”), 1 August 2002. <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>

Memorandum from Daniel Levin to James B. Comey, deputy attorney general, Office of Legal Counsel Re: “Legal Standards applicable under 18 U.S.C. §§ 2340-2340A,” 30 December 2004 (a.k.a. “revised torture memo”) <http://www.usdoj.gov/olc/dagmemo.pdf>.

Memorandum from Patrick Philbin and John Yoo to William Haynes II, “Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba.” 28 December 2001. Available at <http://www.msnbc.msn.com/id/5022681/site/newsweek/>.

Memorandum from John Yoo and Robert J. Delahunty to William Haynes II, “Application of Treaties and Laws to al Qaeda and Taliban Detainees.” Draft. 9 January 2002. Available at <http://www.msnbc.msn.com/id/5025040/site/newsweek/> (in 10-page increments).

Memorandum from Alberto Gonzales to The President, “Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban.” Draft. 5 January 2002. Available at <http://msnbc.msn.com/id/4999148/site/newsweek/>.

Gonzales’ draft decision generated two responses from the State Department:

- 1) Colin Powell’s response to this memo is also available at that website. Memo from Colin Powell to White House Counsel on “Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan.” 26 January 2002. Available at <http://msnbc.msn.com/id/4999363/site/newsweek/>.
- 2) The response of the Legal Advisor to the State Department, William H. Taft IV, to this memo, “Comments on Your Paper on the Geneva Convention” is available at http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf.

Memo from Jack Goldsmith, Assistant Attorney General, Office of Legal Counsel to William Taft IV, General Counsel, Department of State; William Haynes II, General Counsel, Department of Defense; John Bellinger, Legal Advisor for National Security; Scott Muller, General Council, CIA, on the “Permissibility of Relocating Certain ‘Protected Persons’ from Iraq.” 19 March 2004. Available at http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf.

Documents from the Department of Defense

Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. Draft. Authors redacted. 4 April 2003. Available at <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf>. (Note this is the full 85-page version; previous releases cut off in the middle of the report.)

Other Documents and Collections of Documents

An even more extensive list of Bush Administration documents concerning the question of appropriate methods of interrogation of overseas detainees can be found at: <http://www.washingtonpost.com/wp-dyn/articles/A62516-2004Jun22.html>

This list includes memos detailed specific interrogation techniques to be used at Guantánamo and other internal documents of the Department of Defense on the question of proper methods.

The 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 is available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf at 8.

The results of the ACLU's freedom-of-information-act cases, largely producing documents from the Department of Defense but also some from the FBI, can be found at: <http://www.aclu.org/torturefoia/released/>

Mark Danner's book *Torture and Truth* (Yale U Press, 2004) has the most complete set in print of all the documents above. But there are even more documents than those he publishes in his large collection.