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### Torture Lite, Full-Bodied Torture, and the Insulation of Legal Conscience

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## Symposium

### Fighting Terrorism with Torture: Where To Draw the Line?

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#### “Torture Lite,” “Full Bodied” Torture, and the Insulation of Legal Conscience

Seth F. Kreimer\*

#### INTRODUCTION

Several years ago, I began work on a project that I fancied to be both hypothetical and academic. In the aftermath of September 11, a number of commentators, including one prominent member of the legal academy, advanced the proposition that interrogation by torture in pursuit of terrorists should be viewed as permissible under the United States Constitution when undertaken with procedural safeguards.<sup>1</sup> In an article published in 2003, I argued that these commentators were legally sloppy and morally obtuse: no matter what procedures accompany it, interrogation by torture is both at odds with settled constitutional law as it is and profoundly inconsistent with the legal system as it should be.<sup>2</sup>

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\* Kenneth W. Gemmill Professor of Law, University of Pennsylvania Law School. This paper has benefitted from the fine research assistance of Mihir Kshirsagar, as well as the very helpful comments of Marty Lederman, Sandy Levinson, John Parry, and Kim Scheppele. Each of these individuals deserves my profound thanks. None of them deserves responsibility for mistakes that have survived their assistance. This article is based on a presentation made at the January 2005 annual meeting of the Association of American Law Schools. Since that time, a significant amount of information has emerged about the evolution of the current administration’s policies regarding interrogation of detainees. While that information has not been incorporated into the account provided here, the subsequent revelations support the analysis of this article. For one especially revealing narrative of the internal legal discussions, see Memorandum for Inspector General, Dept. of the Navy, from Alberto J. Mora, *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues*, July 7, 2004, available at <http://www.newyorker.com/images/pdfs/moramemo.pdf>.

1. See, e.g., ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002).

2. Seth F. 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). The legal discussion in part III, below, is adapted from that article. In a response to my article, Professor Dershowitz appeared to concede that a fair application of constitutional doctrine would preclude torture, and he simply

At the time, I was suspicious that the Bush administration's disavowals of torture were a bit too carefully worded to be taken at face value. Still, I experienced a mild sense of paranoia when I suggested that a sufficiently unscrupulous lawyer could argue that a differentiation between "cruel, inhuman or degrading treatment" and "torture" might allow our government to tout its adherence to the Convention Against Torture, while simultaneously abusing prisoners to force them to reveal information. In my innocence, I could not shake the feeling that only academics whose imaginations are addicted to worst-case hypotheticals would pursue that sort of logic-chopping.

As it turned out, my imagination was insufficiently bleak. We now know that by the time I began drafting my article, attorneys in the Justice Department and Defense Department already had deployed the arguments that concerned me in support of "torture lite,"<sup>3</sup> and that the military and other government agencies were aggressively turning theory into battlefield doctrine and technique. Notwithstanding repeated public assurances that American forces avoided "torture," obeyed "the law," and acted "humanely" toward captured terrorist suspects, lawyers who set governing policy contrived to generate legal analyses that freed interrogators from legal constraints and insulated executive branch policy in the so-called Global War on Terrorism from the common meaning of "torture" and "humane treatment."<sup>4</sup>

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doubted whether the courts of the United States could be relied upon to apply the doctrine fairly. See Alan M. Dershowitz, *Torture Without Visibility and Accountability Is Worse Than with It*, 6 U. PA. J. CONST. L. 326 (2003). He has since returned to his advocacy of torture warrants. See, e.g., Alan M. Dershowitz, *Stop Winking at Torture and Codify It*, L.A. TIMES, June 13, 2004, at M5.

3. Both popular and national security discussion regularly distinguish between the category of "torture," in which physical assaults on the body of the victim result in excruciating pain, and the category of "torture lite" or "stress and duress" techniques, which involve the infliction of severe physical or psychological stress by means other than physical assault. "Torture lite" techniques include depriving subjects of sleep, light, food, or water, subjecting them to continuous loud noise or bright light, shackling them in excruciating positions, and depriving them of medical attention. The first published mention of "torture lite" I could find is Duncan Campbell, *U.S. Interrogators Turn to "Torture Lite"*, THE GUARDIAN, Jan. 25, 2003, at 17, but the phrase is presented as a term of art. The first public account of the dimensions of abusive interrogations in the "Global War on Terror" was Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

4. Among the uncomfortable echoes I have uncovered in research for this paper is the fact that the Argentinian junta's official name for its "dirty war" was the "War Against Terrorism and Subversion." FRANK GRAZIANO, *DIVINE VIOLENCE: SPECTACLE, PSYCHO-SEXUALITY & RADICAL CHRISTIANITY IN THE ARGENTINE "DIRTY WAR"* 48 (1992); see also *id.* at 86-87 (describing Argentinian practices of the use of hoods (capuchas) and painfully loud music as part of the regular rituals of torture); *id.* at 111 ("All concerns of ethics, of human rights, of due process, of constitutional hierarchies, and of division of power were subordinated to this urgent

## I. THE INSULATED CONSCIENCE AT WORK

In January 2002, the Office of Legal Counsel of the Justice Department (OLC) issued an opinion that prisoners captured during operations in Afghanistan against the Taliban and al Qaeda fell outside of the protections of the Geneva Conventions,<sup>5</sup> and President Bush issued a “determination” to that effect.<sup>6</sup> The apparent moving force for this determination was revealed in a letter of February 1, 2002, from Attorney General John Ashcroft, which argued that the determination would allow the use of “forward leaning” methods of interrogation, while minimizing “the legal risks of liability, litigation and criminal prosecution.”<sup>7</sup>

On August 1, 2002, now-Judge Jay Bybee issued an opinion letter for the OLC to White House Counsel Alberto Gonzales,<sup>8</sup> taking an extraordinarily narrow view of the circumstances under which those who torture captives could be subject to prosecution under 18 U.S.C. §§2340 and 2340A, the federal criminal statute implementing some U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading

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eschatological crusade”; the official combatant is to be a “perfect Crusading Knight for God and Fatherland”); *id.* at 123 (“General Menendez remarked that all of the subversive talk about excessive violence . . . missed the point because the entire problem of subversion and countersubversion *constituted a war.*” (emphasis in original)).

5. Memorandum for William J. Haynes II, General Counsel, Dept. of Defense, from John Yoo, Deputy Asst. Atty. General, and Robert J. Delahunty, Spec. Counsel, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

6. See Memorandum for the President from Alberto R. Gonzales, Counsel to the President, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, Jan. 25, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>, reprinted in MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 83 (2004). In his memorandum, Gonzales referred to some provisions of the Geneva Conventions as “obsolete” and “quaint.” *Id.* at 2 (DANNER at 84).

7. Letter to President George W. Bush from John Ashcroft, Attorney General, Feb. 1, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020201.pdf>, reprinted in DANNER, *supra* note 6, at 92. The Department of Defense reportedly had already ordered that military interrogators should “take the gloves off” in interrogating captured Taliban fighters in late 2001. See Richard Serrano, *Prison Interrogators’ Gloves Came Off Before Abu Ghraib*, L.A. TIMES, June 9, 2004. For a summary of Alberto Gonzales’ advocacy of these “forward leaning” strategies, see Michael Isikoff et al., *Torture’s Path*, NEWSWEEK, Dec. 27, 2004, at 54.

8. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Atty. General, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*, Aug. 1, 2002 [hereinafter Bybee Memo], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>, reprinted in DANNER, *supra* note 6, at 115.

Treatment or Punishment (Torture Convention).<sup>9</sup> Under both the convention and the statute, “torture” involves the intentional infliction of “severe” physical or mental pain or suffering.<sup>10</sup> Relying on a misreading of several wholly inapplicable statutes relating to public health,<sup>11</sup> Bybee concluded that to qualify as “severe,” pain must rise to “the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions.”<sup>12</sup> He

9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Torture Convention]. Article 4 of the Torture Convention, 1465 U.N.T.S. 114, requires each State Party to “ensure that all acts of torture are offences under its criminal law.” The text of the Torture Convention, with links to the reservations, declarations, and understandings of various states upon ratification, can be found at Office of the High Commissioner for Human Rights, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (n.d.), at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm).

10. Torture Convention, *supra* note 9, art. 1(1), 1465 U.N.T.S. 113; 18 U.S.C. §2340(1).

11. Bybee Memo, *supra* note 8, at 5-6 (DANNER at 120).

12. *Id.* at 6 (DANNER at 120). For good measure, the memorandum takes the position that the statutory prohibition of torture in 18 U.S.C. §2340A cannot constitutionally be applied to actions taken under the President’s authority as Commander in Chief. *Id.* at 33-39 (DANNER at 144-149). *But see* United States v. Stanley, 483 U.S. 669, 681-682 (1987) (recognizing “explicit constitutional authorization for Congress ‘[t]o make Rules for the Government and Regulation of the land and naval Forces,’ U.S. Const., Art. I, §8, cl. 14”) (emphasis in original).

For another bit of definitional transmogrification, see Memorandum for Chairman of the Joint Chiefs of Staff from James T. Hill, General, U.S. Army, *Counter-Resistance Techniques*, Oct. 25, 2002 (expressing the belief that the following techniques are “legal and humane”: “use of stress positions (like standing), for a maximum of four hours”; denial of “non-emergent” medical care; “deprivation of light and auditory stimuli”; hooding; removal of clothing; “forced grooming (shaving of facial hair, etc.)”; using “fear of dogs . . . to induce stress”), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.10.25.pdf>, reprinted in DANNER, *supra* note 6, at 179. General Hill was referring to Memorandum for Commander, Joint Task Force 170, from Jerald Phifer, Lt. Col, U.S. Army, *Request for Approval of Counter-Resistance Strategies*, Oct. 11, 2001, and Diane E. Beaver, Joint Task Force 170, Dept. of Defense, *Legal Brief on Proposed Counter-Resistance Strategies*, Oct. 11, 2002 [hereinafter Beaver Memo], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.10.11.pdf>, reprinted in DANNER, *supra* note 6, at 170.

It appears that the August 1, 2002, opinion was withdrawn by OLC chief Jack Goldsmith in June of 2004, shortly before his resignation. Isikoff, *supra* note 7 (“In a tense meeting last June, Jack Goldsmith, then head of the Justice Department’s Office of Legal Counsel, told Gonzales he was withdrawing the Aug. 1 memo. Goldsmith then resigned – at least partly due to his discomfort about the memo.”). It has been superseded by a new memorandum. Memorandum for James B. Comey, Deputy Atty. General, from Daniel Levin, Acting Asst. Atty. General, *Legal Standards Applicable Under 18 U.S.C. §2340-2340A*, Dec. 30, 2004 [hereinafter Comey Memo], available at <http://www.usdoj.gov/olc/dagmemo.pdf>. The Comey Memo provides a somewhat broader account of the impositions that might qualify as “torture,” but it asserts that none of the conclusions of prior OLC memoranda regarding the treatment of

indicated that a single act of kicking a prisoner in the stomach with military boots while forcing him into a kneeling position would not be "torture" subject to prosecution.<sup>13</sup> Meanwhile, in a remarkable feat of legal construction, Bybee's deputy, John C. Yoo, wrote that "interrogation methods that comply with §2340 would not violate our international obligations under the Torture Convention,"<sup>14</sup> apparently forgetting that Article 16 of the convention also obliges the United States to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."<sup>15</sup> An unpublished Justice Department opinion written for the CIA indicates that these gambits made their debut in the fall of 2001.<sup>16</sup>

The publicly available legal opinions from the Department of Defense are a little more careful, but ultimately only marginally less aggressive. The October 11, 2002, opinion of Army Lt. Col. Diane Beaver analyzed proposals for the use of interrogation techniques ranging from removal of clothing and

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detainees would differ under the standards articulated in the new memorandum. *Id.* at 2 n.8. Among the earlier memoranda is apparently one, still classified, in which the CIA was informed by OLC that particular interrogation practices were permissible. *See* David Johnston et al., *Nominee Gave Advice to C.I.A. on Torture Laws*, N.Y. TIMES, Jan 29, 2005, at A1.

13. Bybee Memo, *supra* note 8, at 27 (DANNER at 137-138).

14. Letter to Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Asst. Atty. General, Aug. 1, 2002, at 1, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020801.pdf>, reprinted in DANNER, *supra* note 6, at 108.

15. Torture Convention, *supra* note 9, art. 16, 1465 U.N.T.S. 116. By contrast, the Bybee Memo acknowledges the U.S. duty under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," although under an express reservation entered by the Senate that obligation extends only to acts that would violate the Fifth, Eighth, or Fourteenth Amendment to the U.S. Constitution. *See* Bybee Memo, *supra* note 8, at 17 (DANNER at 129); *accord*, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, Apr. 4, 2003 [hereinafter Working Group Report], at 6, 35, available at <http://www.defenselink.mil/news/Jun2004/d20040622.doc8.pdf>. The reservation in question provides 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 [that term] 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." Resolution of Advice and Consent to the Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, ¶I(2), 136 CONG. REC. S17491 (Oct. 27, 1990).

16. *See* John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26 (describing a Justice Department memo allowing sleep deprivation and "stress factors" so long as no "severe physical or mental pain" resulted). The Barry article also described a presidential order empowering the CIA to "set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness." *Id.* This is probably to be distinguished from what Seymour Hersh describes as a "special-access program" authorized to assassinate, kidnap, and harshly interrogate "high-value" al Qaeda suspects. SEYMOUR M. HERSH, CHAIN OF COMMAND 16 (2004). But given the secrecy, who knows?

“forced grooming” to sleep deprivation, threatening with military working dogs, threats of “death or severely painful consequences for himself or his loved ones,” exposure to cold water or weather, inducing the “misperception of asphyxiation,” and “mild noninjurious physical contact.”<sup>17</sup> The Beaver memorandum (unlike the August 1, 2002, Yoo letter) acknowledged that the United States is bound by the Torture Convention to reject “cruel, inhuman and degrading treatment or punishment,” but only insofar as those acts would violate the “current standard articulated in the 8th Amendment to the United States Constitution.”<sup>18</sup> The memorandum concluded that the proposed methods were consistent with that standard so long as the abuses could “plausibly have been thought necessary . . . to achieve a legitimate governmental objective” (that is, to obtain information), and force is applied “in a good faith effort and not maliciously or sadistically for the very purpose of causing harm.”<sup>19</sup>

As finally refined on April 4, 2003, by the Working Group on Detainee Interrogations in the Global War on Terrorism,<sup>20</sup> the Defense Department’s legal position was slightly more restrained. It retained the distinction between “torture” and “cruel, inhuman and degrading treatment.” It concluded that the statutory prohibition on “torture” interdicted only actions that “cause severe physical or mental pain or suffering.”<sup>21</sup> To be prohibited as torture, physical

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17. Beaver Memo, *supra* note 12 (DANNER at 170). An FBI agent commented in an email message that one DOD lawyer “worked hard to cwrite [sic] a legal justification for the type of interrogations they (the Army) want to conduct” at Guantánamo Bay. *Legal Issues re: Guantanamo Bay*, Dec. 9, 2002, at <http://www.aclu.org/torturefoia/released/FBI.121504.4076.pdf>. I suspect that this lawyer was Lt. Col. Beaver. According to my discussions with a high intelligence official, Beaver was unusual in this regard; operational JAG officers generally were dismayed and outraged by the efforts to dissolve legal constraints. Other reports similarly suggest that most military JAGs were dismayed by the prospect of quasi-torture. *See generally* BARRY, *supra* note 16, at 26 (describing reactions of military JAGs to the torture memos).

18. The analysis is still sloppy. The Beaver Memo refers only to the Eighth Amendment, Beaver Memo, *supra* note 12, at 2 (DANNER at 171), while the U.S. reservation to the Torture Convention refers to the Eighth, Fifth, and Fourteenth Amendments. *See supra* note 15.

19. Beaver Memo, *supra* note 12, at 5 (DANNER at 175).

20. Working Group Report, *supra* note 15. The Secretary of Defense had withdrawn his approval of the Beaver techniques, and he convened the Working Group in response to complaints by JAG officers in January 2003 regarding the pattern of abusive techniques. *See* Barry, *supra* note 16; Dana Priest & Bradley Graham, *U.S. Struggled over How Far To Push Tactics; Documents Show Back-and-Forth on Interrogation Policy*, WASH. POST, June 24, 2004, at A01; Nicole Gaudiano, *Memos Shed Light on Prison Treatment; Rumsfeld OK'd, Then Rescinded, Some Tactics as U.S. Weighed Just How Far It Could Go*, AIR FORCE TIMES, July 5, 2004, at 18. The reconsideration was contemporaneous with complaints from FBI agents regarding interrogation techniques at Guantánamo. *See supra* note 17.

21. Working Group Report, *supra* note 15, at 10.

suffering must attain a “high level of intensity,” although there is no reference to organ failure as a benchmark.<sup>22</sup> Prohibited mental suffering occurs only where it results in “prolonged mental harm” and the conduct is undertaken with the specific intent of bringing about “prolonged mental harm.”<sup>23</sup> The upshot of this fine parsing of statutory obligations seems to be that abuse which avoids physical pain is permitted so long as it is not “specifically intended” to result in “prolonged mental harm.” Sleep deprivation, starvation, sensory deprivation, and sensory bombardment imposed with reckless disregard for long term consequences on the victim are thus not “torture.”

The Working Group also construed the Torture Convention to prohibit such “cruel, inhuman or degrading treatment” as would be prohibited by the Fifth, Eighth, or Fourteenth Amendment.<sup>24</sup> As interpreted by the Working Group, however, this would preclude only actions that “inflict pain or harm without a legitimate purpose,” that “inflict pain or injury for malicious or sadistic reasons,” that “deny the minimal civilized measures of life’s necessities” (but only where “such denial reflects a deliberate indifference to health and safety”), or that “apply force and cause injury so severe and so disproportionate to the legitimate government interest being served that it amounts to a brutal and inhumane abuse of official power literally shocking the conscience.”<sup>25</sup> The Working Group’s conscience was sufficiently insulated from shock to approve the application of 26 techniques *ad libitum* to “unlawful combatants,” including hooding, mild physical contact, dietary manipulation, environmental manipulation, and sleep adjustment, and nine more techniques in limited circumstances, including use of prolonged interrogations, forced grooming, prolonged standing, physical training, sleep deprivation, removal of clothing, “face or stomach slap,” and “use of aversions.”<sup>26</sup> The report helpfully appended a 455-cell chart setting forth the advantages and disadvantages of each technique.<sup>27</sup>

The Working Group Report omitted some of the more offensive proposals of the Beaver Memo, and unlike the Bybee Memo it made no mention of military boots to the stomach. Notwithstanding its relatively restrained tone and the faux precision of its attached chart, however, the Working Group Report did not specifically disapprove of any technique. Military lawyers perceived in the Group’s report “a calculated effort to create an atmosphere of

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22. *Id.*

23. *Id.* at 11-12.

24. *Id.* at 6, 67.

25. *Id.* at 67; *see id.* at 36-39 (discussing the Supreme Court’s treatment of torture under the Eight Amendment).

26. *Id.* at 70 & tbls. 2A, 2B, 3A, 3B.

27. *Id.* at tbls. 1A to 3B.

legal ambiguity.”<sup>28</sup> Nor did the report revoke any earlier permissions to other government agencies. The Working Group observed with understated foresight, “Should information regarding the use of more aggressive interrogation techniques than have been used traditionally by U.S. forces become public, it . . . may produce an adverse effect on support for the war on terrorism.”<sup>29</sup>

Apparently relying on this sort of guidance, interrogations of prisoners at the Guantánamo naval base, which commenced in January 2002, regularly featured “torture lite,” including deafening music, blinding lights, threatening dogs, sensory deprivation, extremes of heat and cold, and excruciating “stress positions.”<sup>30</sup> Interrogation occasionally descended into beating of prisoners and twisting of thumbs, according to both the testimony of inmates and recently revealed records of FBI observers.<sup>31</sup> At the same time, CIA operatives

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28. See Barry, *supra* note 16; HERSH, *supra* note 16, at 66.

29. Working Group Report, *supra* note 15, at 69.

30. See Barry, *supra* note 16.

Ultimately what was developed at Gitmo was a “72-point matrix for stress and duress,” which laid out types of coercion and the escalating levels at which they could be applied. These included the use of harsh heat or cold; withholding food; hooding for days at a time; naked isolation in cold, dark cells for more than 30 days; and threatening (but not biting) by dogs. It also permitted limited use of “stress positions” designed to subject detainees to rising levels of pain.

*Id.* One FBI agent “observed strobe lights in interview rooms” and “heard loud music,” but did not observe abuse. Memorandum from a Critical Incident Response Group Agent to FBI Inspection Division, July 13, 2004, at [http://www.aclu.org/torturefoia/released/FBI.121504.4499\\_4501.pdf](http://www.aclu.org/torturefoia/released/FBI.121504.4499_4501.pdf). Another FBI agent’s account of interrogations at Guantánamo includes a description of detainees shackled hand and foot in a fetal position on the floor. The agent states that most detainees were kept in that position for 18 to 24 hours or more and that most had urinated or defecated on themselves. On one occasion, the agent reported having seen a detainee left in an unventilated, non-air conditioned room at a temperature “probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.” Email to Valerie E. Caproni, Office of General Counsel, FBI, Aug. 2, 2004, at <http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf>; see also Memorandum re: *GTMO Issues for SAC Wiley* (n.d.) (noting loud music, bright lights, sleep deprivation, growling dogs), at <http://www.aclu.org/torturefoia/released/FBI.121504.4585.pdf>.

31. See, e.g., *David Hicks Alleges Torture*, AUSTRALIANPOLITICS.COM, Aug. 5, 2004 (containing affidavit of Australian inmate at Guantánamo alleging beatings during interrogation and denial of food), at [http://www.australianpolitics.com/news/2004/12/04-12-10\\_hicks.shtml](http://www.australianpolitics.com/news/2004/12/04-12-10_hicks.shtml); *Ex-Guantanamo Detainees from Britain Sue Rumsfeld*, REUTERS, Oct. 27, 2004 (“The federal court suit alleges they faced repeated beatings, death threats, interrogation at gunpoint, forced nakedness, and menacing with unmuzzled dogs, among other mistreatment, during more than two years at Guantanamo Bay.”), available at <http://www.commondreams.org/headlines/04/1027-09.htm>; Paisley Dodds, *Memo: Workers Threatened over Prison Abuse*, ASSOCIATED PRESS, Dec. 7, 2004 (discussing the memos from FBI agents expressing misgivings about the

undertook what might be called “full bodied” torture of suspected terrorists in secret locations, including denial of pain medication, beatings, sensory assaults, and “water boarding.”<sup>32</sup>

The Guantánamo techniques migrated to Iraq, notwithstanding the Administration’s official position that the Geneva Conventions applied in the latter venue.<sup>33</sup> In a vivid illustration of the reality of slippery slopes, military

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treatment of detainees that were released pursuant to a Freedom of Information Act suit filed by the ACLU); *FBI Letter Cites Guantanamo Abuse*, ASSOCIATED PRESS, Dec. 7, 2004 (describing a letter from Thomas Harrington, an FBI counterterrorism expert who led a team of investigators at Guantánamo Bay, to Maj. Gen. Donald J. Ryder, the Army’s chief law enforcement officer. One female interrogator was reported having “grabbed [a] detainee’s thumbs and bent them backward and . . . also grabbed his genitals.” A witness reportedly “implied that her treatment of that detainee was less harsh than her treatment of others by indicating that he had seen her treatment of other detainees result in detainees curling into a fetal position on the floor and crying in pain.” In September or October of 2002, FBI agents saw a dog used “in an aggressive manner to intimidate a detainee,” the letter said. About a month later, agents reportedly saw the same detainee “after he had been subjected to intense isolation for over three months . . . totally isolated in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma . . . talking to nonexistent people, reported hearing voices (and) crouching in a corner of the cell covered with a sheet.” In October 2002, another FBI agent saw a detainee “gagged with duct tape that covered much of his head” because he would not stop chanting from the Quran.), *available at* <http://abcnews.go.com/International/wireStory?id=307303>.

32. See, e.g., Douglas Jehl & Tim Golden, *C.I.A. Is Likely To Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, §1, at 6; Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment; Afghan’s Death Took Two Years To Come to Light; Agency Says Abuse Claims Are Probed Fully*, MAR. 3, 2005, WASH. POST, at A01; Josh White, *Documents Tell of Brutal Improvisation by GIs; Interrogated General’s Sleeping-Bag Death, CIA’s Use of Secret Iraqi Squad Are Among Details*, WASH. POST, Aug. 3, 2005, at A01; David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, §1, at 1.

33. See Dexter Filkins, *General Will Trim Inmate Numbers at Iraq Prison*, N.Y. TIMES, May 5, 2004 (reporting that the U.S. commander in charge of military jails in Iraq, Maj. Gen. Geoffrey D. Miller, who was earlier chief of detentions and interrogations at Guantánamo, “decided to end the hooding of prisoners, largely because it was too humiliating. But he defended practices like depriving prisoners of sleep and forcing them into ‘stress positions’ as legitimate means of interrogation, noting that they are among 50-odd coercive techniques sometimes used against enemy detainees.”); Don Van Natta Jr., *Interrogation Methods in Iraq Aren’t All Found in Manual*, N.Y. TIMES, May 7, 2004, at A13 (describing techniques including the use of strobe lights and loud music, shackling prisoners in awkward positions for long hours, and manipulating the levels of pain medication, a tactic that was reportedly used during the interrogation of Abu Zubaydah, a member of al Qaeda who was captured in early 2003 in Pakistan after being wounded by gunshots. “‘We will *no longer*, in any circumstances, hood any of the detainees,’ General Miller said. ‘We will *no longer* use stress positions in any of our interrogations. And we will not use sleep deprivation in any of our interrogations.’ Exceptions to any of the new regulations would require his direct approval, he said.”) (emphasis supplied); Email from On Scene Commander, Baghdad, to M.C. Briese, FBI, May 22, 2004 (noting that

jailers were directed to “set the conditions” for favorable interrogation in a fashion that spiraled into the photographically documented activities at Abu Ghraib.<sup>34</sup> At the same time, special forces operators and intelligence teams in Iraq were busy deploying “full bodied” torture in the search for “high value” insurgents.<sup>35</sup> These initiatives, which can hardly be described as anything short of “severe,”<sup>36</sup> included such techniques as mock executions, electric

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FBI agents heard or saw indications of interrogations utilizing “sleep deprivation, stress positions, loud music”; stating that there was no need to report as “abuse” actions authorized by “Executive Order,” including “sleep ‘management,’ use of MWDs (Military Working Dogs), ‘stress positions,’ . . . loud music, sensory deprivation through the use of hoods, etc.”; but concluding that “[w]e will consider as abuse any physical beatings, sexual humiliation or touching, or other conduct clearly constituting abuse”), at [http://www.aclu.org/torturefoia/released/FBI.121504.4940\\_4941.pdf](http://www.aclu.org/torturefoia/released/FBI.121504.4940_4941.pdf).

34. See HERSH, *supra* note 16, at 29, quoting from Article 15-6 Investigation of the 800th Military Police Brigade (n.d.) [hereinafter *Taguba Report*], at 18, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/Taguba%20Report.pdf>, reprinted in DANNER, *supra* note 6, at 279, 294.

35. See HERSH, *supra* note 16, at 46-48, 60-61 (describing secret military program encouraging sexual humiliation and physical coercion to gain information about the insurgency).

36. See *Final Report of the Independent Panel To Review DOD Detention Operations*, Aug. 24, 2004 [hereinafter *Schlesinger Report*], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>, reprinted in DANNER, *supra* note 6, at 329, 336 (noting five documented cases of what were delicately referred to as “detainee deaths as a result of abuse by U.S. personnel during interrogations,” with 23 more under investigation); HERSH, *supra* note 16, at 43, 45 (reporting that “[p]eople were beaten to death” and that one Iraqi was “stressed . . . so bad” that he “passed away”); Arthur Kane, *Army Court Documents Detail Fatal Interrogation Technique*, DENVER POST, Dec. 21, 2004, at A20 (describing a detainee “placed in a sleeping bag and tied with an electrical cord in what the Army referred to as stress positions during a Nov. 26, 2003, interrogation at the Qaim detention facility northwest of Baghdad. . . . This particular stress position has been used in the past and had rendered one person unconscious. . . . Special forces and other individuals previously interrogated the general, leaving him with ‘bruises, contusions, and possibly some fractured ribs . . . .’”); Pamela Hess, *Iraq Task Force Punished for Use of Tasers*, WASH. TIMES, Dec. 8, 2004 (“Four members of a special task force in Iraq have been punished for excessive use of force against Iraqi prisoners, and the same group has issued 10 reprimands for detainee abuse, the Pentagon said. . . . [T]he DIA interrogators saw a prisoner punched in the face until he needed medical attention, and saw prisoners arrive at the detention facility with burn marks on their backs and complaining of kidney pain, according to the memo. . . . I’m advised that it was the unauthorized use of Taser (stun gun). . . . The Navy Special Warfare Command has two special courts-martial pending (for the death of an Iraqi prisoner.”); Josh White, *U.S. Generals Told of Detainee Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004 (discussing a report by Col. Stuart A. Herrington of prisoner abuse, including beatings by members of Task Force 121, “a joint Special Operations and CIA mission searching for weapons of mass destruction and high-value targets, including Saddam Hussein”); Press Release, ACLU, *Special Ops Task Force Threatened Government Agents Who Saw Detainee Abuse in Iraq*, Dec. 7, 2004 (discussing a June 25, 2004, memo from Vice Admiral Lowell E. Jacoby, Defense Intelligence Agency, entitled “Alleged Detainee Abuse by TF 62-6,”

shocks, dislocating limbs, asphyxiation, and the application of lighted cigarettes to ear canals.<sup>37</sup>

## II. THE RESPONSE TO ABU GHRAIB

Some of these facts came to light in the summer of 2004 with the initial publication of the pictures of abuses at Abu Ghraib. In the news conference called in response to that publicity, White House Counsel Alberto Gonzales reiterated incessantly that the Administration’s policy forbade “torture” and that the United States intended to “follow its treaty obligations and U.S. law, both of which prohibit the use of torture.”<sup>38</sup> He stated three times, with slight variations, that “[a]ll interrogation techniques authorized for use against the Taliban and al Qaeda and in Iraq have been carefully vetted and determined

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describing how DIA personnel who complained about abuses were threatened, had their car keys confiscated and emails monitored, and were ordered “not to talk to anyone in the U.S.” or leave the base, “even to get a haircut”; how the task force’s officers punched a prisoner in the face “to the point he needed medical attention,” failed to record the medical treatment, and confiscated DIA photos of the injuries), *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17156&c=206>.

Further reports of detainee abuse apparently will be issued at some point. *See* Dept. of Defense, *Operational Update Briefing Transcript*, Jan. 13, 2005 (“we expect that there will be further announcements regarding detainee operations involving abuse allegations”), *available at* <http://198.65.138.161/military/library/news/2005/01/mil-050113-dod01.htm>.

37. *See, e.g.*, Email to FBI, *Re: TF 6-26 Update*, June 25, 2004, *at* <http://www.aclu.org/torturefoia/released/FBI.121504.4887.pdf> (describing “suspicious burns” on prisoners); Memorandum from Vice Admiral L.E. Jacoby, U.S. Navy, Director, DIA, to the Under-Secretary of Defense for Intelligence, June 25, 2004 [hereinafter Jacoby Memo] (discussing reports of prisoners with burn marks on their backs, bruises, and kidney pain), *at* [http://www.aclu.org/torturefoia/released/t2596\\_0297.pdf](http://www.aclu.org/torturefoia/released/t2596_0297.pdf); David DeBatto, *Whitewashing Torture?*, SALON.COM, Dec. 8, 2004, *at* <http://www.salon.com/news/feature/2004/12/08/coverup> (describing incidents in Samarra, Iraq, in June 2003 of “asphyxiation, mock executions, arms being pulled out of sockets, and lit cigarettes forced into detainee’s ears while they were blindfolded and bound”); Memo to the FBI Director, June 25, 2004, *at* [http://www.aclu.org/torturefoia/released/FBI.121504.4910\\_4912.pdf](http://www.aclu.org/torturefoia/released/FBI.121504.4910_4912.pdf) (discussing potential publicity from the report of a whistleblower who claimed to have observed beatings, strangulation, and placement of lit cigarettes in detainees’ ear openings in Iraq); *see also* Editorial, *Disgraced by Silence; When Will the President Respond to Cascading Allegations of Prisoner Abuse by the Military?*, L.A. TIMES, Dec. 19, 2004, at 4 (“Army troops repeatedly beat Afghan prisoners in their custody, ripped off their toenails, shocked them, and dunked them in cold water, according to recent reports from a U.N. group.”); Press Release, ACLU, *U.S. Marines Engaged in Mock Executions of Iraqi Juveniles and Other Forms of Abuse*, Dec. 14, 2004 (describing accounts of mock executions, use of electricity, setting hands on fire with alcohol), *at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17206&c=206>.

38. *Press Briefing by White House Counsel Judge Alberto Gonzales et al.*, June 22, 2004, *at* <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>.

to not constitute torture under the definition provided by Congress and the convention against torture, as ratified by the United States.”<sup>39</sup> He denied that “the president . . . authorized, ordered or directed” violations of “the standards of the torture conventions or the torture statute.”<sup>40</sup>

Gonzales’s statements traded on definitional manipulation of the sort that endeared certain lawyers to the principals of Enron. The commitments to obey “the law” and to avoid “torture” rest on the hidden premise that “the law” prohibits “torture” but not “cruel, inhuman or degrading treatment” and that “the law” tracks the precisely constricted definition of “torture” of the Bybee Memo and Working Group Report. The denial that the President “authorized, ordered, or directed” any techniques that meet the narrow definition of “torture” does not deny that President Bush or any other high official was deliberately indifferent to, colluded in, or contemplated such actions.<sup>41</sup> These statements are accurate in precisely the same sense that President Clinton’s claim that he “did not have sex with that woman” was accurate.

Rather than taking responsibility for his evasions, Gonzales attempted to claim that the Administration was “just following orders,” because the crucial definition of “torture” is the one purportedly “provided by Congress.”<sup>42</sup> Yet in 2004, the Senate by voice vote adopted Senator Richard Durbin’s amendment to the pending Department of Defense Authorization Act, which

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39. *Id.*

40. *Id.* Gonzales declared, “What he has done is ordered a standard of conduct that is clearly lawful.” Giving some sense of what might come next, he added, “he has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary to protect the national security of this country.” Apparently this refers to the still unwithdrawn claim in the Working Group Report, *supra* note 15, at 24, that “[a]ny effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.” Perhaps a claim that the Administration is “obeying the law” simply means it is doing what the President wants it to do.

41. Nor does it deny that the Administration will consciously deliver suspects into the hands of nations that will subject them to “full bodied” torture, *see, e.g.*, Steven Grey, *US Accused of “Torture Flights,”* SUNDAY TIMES (London), Nov. 14, 2004, at 24 (describing the use of private jets chartered by U.S. intelligence agencies to ferry suspects to countries that engage in torture); Dana Priest, *Jet Is an Open Secret in Terror War,* WASH. POST, Dec. 27, 2004, at A1 (same), or that the Administration will attempt to use information gained through torture to justify continued incarceration of detainees. *See U.S. Uses Evidence Gained by Torture,* ASSOCIATED PRESS, Dec. 2, 2004 (citing statements made in federal court by Assoc. Attorney General Brian Boyle arguing that nothing in the Due Process Clause prevents the use of evidence obtained from torture by the military’s combatant status review tribunals at Guantánamo).

42. Lest the point be missed, Gonzales reiterated in the briefing, “The definition of torture that the administration uses is the definition that Congress has given us. . . . That’s the definition that Congress has given us.” *Press Briefing,* *supra* note 38.

explicitly provided that “[n]o person in the custody or under the physical control of the United States shall be subject to torture *or cruel, inhuman, or degrading treatment* that is prohibited by the Constitution, laws, or treaties of the United States.”<sup>43</sup> The Administration opposed the amendment, and its allies in the House amended the bill in conference to substitute a “sense of the Congress” declaration that the Constitution, laws, treaties, and applicable guidance and regulations prohibit “cruel, inhuman, or degrading treatment of foreign prisoners,”<sup>44</sup> and an announcement of a policy to “ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.”<sup>45</sup>

The nomination of Alberto Gonzales to be Attorney General brought a new round of obfuscatory parsing of legal obligations. On the eve of hearings on the Gonzales nomination, OLC issued a revised memorandum on torture to replace the Bybee Memo.<sup>46</sup> The new memorandum retained the distinction between “torture” and “cruel, inhuman or degrading treatment,” while broadening the definition of “torture” from actions which bring pain equivalent to that accompanying organ failure to actions which bring about “severe” physical pain or physical suffering that is both intense and of extended duration.<sup>47</sup> While there was no mention of military boots to the stomach, the new OLC memorandum did observe that neither kickings, clubbings, nor beatings, if not frequent, extended, and severe, nor incommunicado detention accompanied by death threats, would meet the “rigorous definition of torture.”<sup>48</sup> In a footnote, OLC expressed the “belief” that notwithstanding disagreements with the Bybee Memo, no conclusion expressed in any earlier

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43. S. 2401, 108th Cong., §1057(b) (2004) (emphasis supplied).

44. Ronald W. Reagan National Defense Appropriation Act for Fiscal Year 2005, Pub. L. No. 108-375, §1091(a)(6), 118 Stat. 1811, 2068 (2004). The provision as enacted further limited this obligation to persons “in the custody or under the physical control of the United States as a result of armed conflict.” *Id.* §1091(c). This limitation may serve to exclude individuals detained outside of war zones by either the CIA or the military.

45. *Id.* §1091(b)(1). Section 1092 directed that the Secretary of Defense prescribe policies “intended to ensure” compliance with these policies. Compliance is not required, however, only an intent to ensure compliance. Section 1093 imposes reporting requirements. The CIA was subjected to no similar obligations.

46. Comey Memo, *supra* note 12.

47. *Id.* at 6-7 (distinguishing torture from cruel, inhuman or degrading treatment); *id.* at 8-12 (defining “severe” pain or suffering). The new opinion also retreated from the claim that the torture statute could be avoided if the “intent” of the torturer was to accomplish some non-torturous end. *Id.* at 17. It made no mention of presidential authority to disregard statutory obligations, although it did not repudiate such authority.

48. *Id.* at 9-10; *see also id.* at 15 (gunpoint detention and repeated death threats are not “torture”).

opinion on treatment of detainees would be different under the newer analyses.<sup>49</sup>

In oral testimony at his confirmation hearings, Gonzales once again sought to convey the misleading impression that by disavowing “torture,” the Bush administration renounced cruelty in interrogation, while speaking carefully enough to retain the option of engaging in “cruel, inhuman, or degrading treatment.”<sup>50</sup> Subsequent written answers clarified matters somewhat. In one stark example, Gonzales, speaking for the Administration, took the position that the Convention Against Torture, as ratified by the Senate, prohibited cruel, inhuman or degrading treatment – as opposed to torture – only where such conduct was prohibited by the Fifth, Eighth, or Fourteenth Amendment. Since the Bush administration had concluded that the Fifth Amendment “does not provide rights for aliens unconnected with the United States who are overseas,” he asserted, “there is no legal prohibition under the [Convention Against Torture] on cruel, inhuman, or degrading treatment with respect to aliens overseas.”<sup>51</sup> Nonetheless, Gonzales stated that the “Administration also wants to be in compliance with the relevant substantive constitutional standard . . . even if such compliance is not legally required,” and that “analysis of [interrogation] practices” for such compliance is “still underway.”<sup>52</sup>

Apparently President Bush entirely supports this approach. Given the option to disavow “loopholes” which permit cruel, inhuman or degrading

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49. *Id.* at 2 n.8.

50. The tropes of obedience to “the law” and disavowal of “torture” (silently defined narrowly) occurred throughout the hearings. One representative interchange occurred with Senator Durbin: “SEN. DURBIN: Then let’s go to specific questions. Can U.S. personnel legally engage in torture or cruel, inhuman, or degrading treatment under any circumstances? MR. GONZALES: Absolutely not. *I mean*, our policy is we do not engage in torture.” *Transcript: Senate Judiciary Committee Confirmation Hearing*, N.Y. TIMES, Jan. 6, 2005 (emphasis supplied).

51. Responses of Alberto R. Gonzales, Nominee to be Attorney General, to the Written Questions of Senator Dianne Feinstein, Jan. 18, 2005, at 9-10 (on file with the Journal of National Security Law & Policy). This position is at odds with the conclusion of the Working Group Report, *supra* note 15, at 67, that the substantive limits of the Fifth, Eighth, and Fourteenth Amendments define the actions that constitute violations of the CAT. *See also* Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, at A10 (“The United States noted in a treaty reservation that this safeguard [Article 16 of the Torture Convention] is to be measured by [the Fifth, Eighth, and Fourteenth Amendment bans on abuse that] shocks the conscience. . . . We are not legally free to choose cruel techniques just because they fall short of torture.”).

52. Responses of Alberto R. Gonzales, *supra* note 51.

treatment in the aftermath of the Gonzales testimony, Bush declined to do so.<sup>53</sup>

### III. SHOCKING THE CONSCIENCE

It seems to be common currency in the thinking of the Bush administration that “torture” is impermissible, but that some actions which are “cruel, inhuman or degrading” are permitted. In drawing the line between permissible and impermissible actions with respect to geographical areas within American sovereignty, and probably with respect to American citizens overseas, the Administration seems to acknowledge that its actions are constrained by the Constitution. Abuses that are unconstitutional are impermissible, even if they do not constitute “torture” in the peculiar locutions of the current administration. Moreover, in some more recent analyses, the Administration seems to admit that even for non-citizens overseas, the United States has committed itself to refraining from “cruel, inhuman, and degrading treatment” of the sort that would violate the Fifth, Eighth, or Fourteenth Amendment, although the legal status of that commitment awaits clarification. It is therefore worth returning to constitutional sources to reflect on the constitutional constraints on official brutality. The Supreme Court’s decisions under the Fifth, Eighth, and Fourteenth Amendments describe an interlocked set of limits on government cruelty that together provide an account of the boundaries of legitimate governmental action. Those decisions prohibit abuses that are shocking to the conscience, even if the abuses are intended to thwart terrorists.

#### A. *Cruel Punishment – and Common Decency*

##### 1. *The Protection Against Cruelty*

If anything is clear in constitutional law, it is that the Eighth Amendment’s prohibition of “cruel and unusual punishments” bars both “torture” of the sort

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53. *President Holds Press Conference*, Jan. 26, 2005, available at <http://www.whitehouse.gov/news/releases/2005/01/20050126-3.html> (“Q: Mr. President, I’d like to ask you about the Gonzales nomination, and specifically, about an issue that came up during it, your views on torture. You’ve said repeatedly that you do not sanction it, you would never approve it. But there are some written responses that Judge Gonzales gave to his Senate testimony that have troubled some people, and specifically, his allusion to the fact that cruel, inhumane, and degrading treatment of some prisoners is not specifically forbidden so long as it’s conducted by the CIA and conducted overseas. Is that a loophole that you approve? THE PRESIDENT: Listen, Al Gonzales reflects our policy, and that is we don’t sanction torture. He will be a great Attorney General, and I call upon the Senate to confirm him.”).

nominally abjured by the Bush administration and the imposition of pain and degradation. The original impetus for the amendment came from the Framers' repugnance toward the use of torture, which was regarded as incompatible with the liberties of Englishmen.<sup>54</sup> Even for those sentenced to death, the Court has held for more than a century that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden."<sup>55</sup> The Eighth Amendment precludes "wanton infliction of physical pain," even for those convicted of the most heinous of crimes.<sup>56</sup>

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54. See *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("the primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment") (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (tracing the "cruel and unusual" punishment ban to the English Bill of Rights of 1689, which prohibited punishments "unauthorized by statute and beyond the jurisdiction of the sentencing court"). For a discussion of the historical background of the American rejection of torture, see *infra* text accompanying notes 113-124.

55. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878). The Court has regularly proclaimed that torture – the infliction of lingering and excruciating pain – is out of bounds, even where capital punishment is warranted. See *In re Kemmler*, 136 U.S. 436, 447 (1890) ("punishments are cruel when they involve torture or a lingering death"); *Estelle*, 429 U.S. at 102 (quoting *Kemmler*); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (noting that the "[p]rohibition against the wanton infliction of pain has come into our law" from the English Bill of Rights); *Weems v. United States*, 217 U.S. 349, 370 (1910) (quoting *Kemmler*).

56. See *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (holding that shackling in a painful position at a "hitching post" for an extended time is unconstitutional because "[t]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment") (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)); *Helling v. McKinney*, 509 U.S. 25, 31-33 (1993) (declaring that conditions of prison confinement that are sure or very likely to cause serious illness and needless suffering violate the Eighth Amendment); *Hudson v. McMillian*, 503 U.S. 1, 7-8 (1992) (reaffirming, in a case involving beating by prison guards, the "general requirement" that the Eighth Amendment proscribes "unnecessary and wanton infliction of pain" or torture, even if no serious physical injury eventuates); *id.*, 503 U.S. at 26 (Thomas, J., dissenting) ("'Diabolic or inhuman' punishments by definition inflict serious injury. That is not to say the injury must be, or always will be, physical. 'Many things . . . may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause.'") (emphasis in original) (citation omitted); *Estelle*, 429 U.S. at 103 (holding that denial of medical care for "serious medical needs" that is likely to result in substantial pain or suffering violates the Eighth Amendment because "unnecessary suffering is inconsistent with contemporary standards of decency") (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)); *cf. O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting) ("That [cruel and unusual] designation . . . is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering."); *Weems*, 217 U.S. at 372-373 (holding that sentencing a defendant to labor under painful conditions violated the Eighth Amendment, which was motivated by the Framers' suspicion that "power might be tempted to cruelty").

For convicted prisoners, the Eighth Amendment bars guards from engaging in calculated brutality and forbids the state from denying the necessities of a safe and minimally decent existence.<sup>57</sup>

Of its own force, the Eighth Amendment applies only to actions that constitute “punishment.” Nonetheless, despite its professed hesitance to make the Constitution a “font of tort law,” the Supreme Court has recognized that the Due Process Clauses impose cognate limits outside of the context of criminal punishment; due process is “intended to prevent government . . . ‘from abusing [its] power, or employing it as an instrument of oppression.’”<sup>58</sup> The Court has enunciated a series of constitutional limits on the capacity of government to deploy force against individuals. In law enforcement, the Fourth Amendment, applicable to the states through the Due Process Clause of the Fourteenth Amendment, has been held to bar police from employing excessive force in carrying out arrests even with probable cause,<sup>59</sup> or from engaging in extremely invasive searches for evidence, even with a warrant.<sup>60</sup> When the government takes custody of those not convicted of crimes, the Due

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To violate the Eighth Amendment, the imposition in question must be the result of either intent or deliberate indifference. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (applying a “deliberate indifference” requirement to the conduct of prison officials accused of failing to protect an inmate from assaults by other inmates). Infliction of coercive pain is of course entirely intended in the situations we consider.

57. The Constitution “does not mandate comfortable prisons,” *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981), but neither does it permit inhumane ones, and it is now settled that “the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.” *Helling*, 509 U.S. at 31. In its prohibition of “cruel and unusual punishments,” the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. *See McMillian*, 503 U.S. 1. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must “take reasonable measures to guarantee the safety of the inmates.” *Hudson v. Palmer*, 468 U.S. 517, 526-527 (1984). *See also Farmer*, 511 U.S. at 834-835; *Helling*, 509 U.S. at 31-32; *Washington v. Harper*, 494 U.S. 210, 225 (1990); *Estelle*, 429 U.S. at 103. *Cf. DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 198-199 (1989).

58. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)).

59. *See Graham v. Connor*, 490 U.S. 386, 387 (1989) (setting forth an objective reasonableness test for measuring excessive force); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (subjecting a police roadblock to Fourth Amendment requirements); *Tennessee v. Garner*, 471 U.S. 1 (1985).

60. *See Winston v. Lee*, 470 U.S. 753 (1985).

Process Clauses bar officials from physical assault or denial of minimal standards of decent treatment.<sup>61</sup> Indeed, enforcement of standards of minimum decency against officials came during the 1990s to represent the largest part of the civil constitutional caseload of lower federal courts.<sup>62</sup>

In the last decade, the Court has enunciated general protections against government cruelty. It has held that due process substantively protects against physical abuses that “shock the conscience of the court,” even if the abusive acts are not covered by a specific constitutional constraint. This line of cases originates in *Rochin v. California*,<sup>63</sup> which arose out of Los Angeles sheriff’s deputies’ pursuit of a tip that Antonio Rochin had been dealing in narcotics. The deputies burst into Rochin’s apartment and observed two suspicious capsules on the night stand beside the bed on which Rochin lay partly undressed. When Rochin swallowed the capsules, the deputies handcuffed him and conveyed him to a hospital where, “at the directions of one of the officers, a doctor forced an emetic solution through a tube into Rochin’s stomach against his will.” Rochin vomited, producing the suspect capsules. Over Rochin’s objection, the capsules and the morphine they contained were introduced into evidence at his subsequent trial.

Justice Frankfurter, writing for six members of the Court, found that this course of conduct violated the demands of due process, which guarantee “respect for those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.”<sup>64</sup> Observing that due process requires the

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61. In *Collins v. Harker Heights*, 503 U.S. 115, 127 (1992), the Court summarized its holdings:

We have held, for example, that apart from the protection against cruel and unusual punishment provided by the Eighth Amendment . . . the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, *see Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 545 (1979), for persons in mental institutions, *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982), for convicted felons, *Turner v. Safley*, 482 U.S. 78, 94-99 (1987), and for persons under arrest, *see Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-245 (1983).

*See also West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring) (“a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it, and who causes physical harm to such a person by deliberate indifference, violates the Fourteenth Amendment’s protection against the deprivation of liberty without due process.”).

62. Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 470 (1997) (describing prevalence of constitutional claims against street-level bureaucrats for abuse of force).

63. 342 U.S. 165 (1952).

64. *Rochin*, 342 U.S. at 169 (citations omitted).

state to “respect certain decencies of civilized conduct,” the opinion declared of *Rochin*’s treatment at the hands of the deputies:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.<sup>65</sup>

While the issue before the Court in *Rochin* was the use of evidence in a criminal prosecution, it rapidly became clear that the conscience of the Court turned on the “coercion, violence, or brutality to the person” involved.<sup>66</sup> By the end of the century, *Rochin* was being cited as a keystone in the constitutional protection of bodily integrity against arbitrary invasion.<sup>67</sup> In *County of Sacramento v. Lewis*,<sup>68</sup> the Court announced a general approach to the problem of abuse of force. Relying on *Rochin*, the Court held that in circumstances covered by neither the Fourth Amendment nor the Eighth Amendment, the Due Process Clause bars executive officials “from abusing

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65. *Id.* at 172; *see also id.* at 173 (“It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.”).

66. *Irvine v. California*, 347 U.S. 128, 133 (1953); *accord Schmerber v. California*, 384 U.S. 757 (1966); *see also Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (“Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”); *West*, 487 U.S. at 58 (Scalia, J., concurring in the judgment) (construing prisoner’s claim as one premised on substantive due process); *Ingraham v. Wright*, 430 U.S. 651, 673-674 (1977); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (deciding that involuntary blood test was not sufficiently “brutal” or “offensive” to invoke *Rochin*); *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (“*Rochin v. California* . . . must stand for the proposition that, quite apart from any “specific” of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.”).

67. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (recognizing “bodily integrity” as included in liberty “specially protected” by due process); *id.* at 777 (Souter, J., concurring); *Planned Parenthood v. Casey*, 505 U.S. 833, 849, 857 (1992) (citing *Rochin* for protection of bodily integrity); *id.* at 915 (Stevens, J., concurring in part and dissenting in part) (same); *id.* at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (same).

68. 523 U.S. 833 (1998).

their power or employing it as an instrument of oppression” in a fashion that “shocks the conscience of the court.”<sup>69</sup>

## 2. Cruelty and Interrogation

*Rochin* grounded its analysis in an analogy to the values of the Self Incrimination Clause: the state’s assault was “too close to the rack and screw to permit of constitutional differentiation.”<sup>70</sup> Two years ago, in *Chavez v. Martinez*,<sup>71</sup> the Court returned to the proposition that the powers of government to inflict injury in the search for information are constrained by substantive due process.

In *Chavez*, a plaintiff who had been interrogated for 45 minutes while screaming in pain and awaiting medical treatment after being shot in the face by the police, sought damages for violation of his constitutional rights. *Chavez* was argued a little over a year after the September 11 attacks, against the backdrop of the ongoing “war on terror,” just as Secretary Rumsfeld was privately approving the techniques advocated by the Beaver memorandum. The federal government’s arguments invited the Court to excuse physically aggressive interrogation on the basis of the exigencies of law enforcement and the possibility of ticking bombs.<sup>72</sup>

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69. *Id.* at 846. In the context of a high speed police chase, the Court held that conduct lacking an “intent to harm suspects physically” would not “shock the conscience,” although it left open the scope of “conscience-shocking” conduct in other circumstances. *Id.* at 854; *see United States v. Lanier*, 520 U.S. 259, 262 (1997) (reversing the dismissal of a civil rights prosecution of a state judge who sexually assaulted and orally raped litigants and employees, where the trial court correctly charged that physical assault would violate the Constitution if the conduct involved “physical force, mental coercion, bodily injury, or emotional damage which is shocking to one’s conscience.”).

70. *Rochin*, 342 U.S. at 172.

71. *Chavez v. Martinez*, 538 U.S. 760 (2003).

72. The Solicitor General, on behalf of the United States as *amicus curiae*, argued for “breathing space” needed “for law enforcement to confront imminent threats,” putting before the Court the picture of police “seeking life-saving information” from a suspect regarding a “bomb about to explode,” and inviting the Court to approve such measures as “grabbing of the throat,” pointing a gun at the suspect’s temple, and threatening to “knock [the suspect’s] remaining teeth out of his mouth if he remained silent.” *Chavez*, Brief for the United States as *Amicus Curiae* Supporting Petitioner, 2002 WL 31100916 (U.S.), at \*7, \*21, \*24, \*25, and \*29; *see id.*, Reply Brief of the Petitioner, 2002 WL 31655026, at \*7 (also invoking the “bomb about to explode”); *see also id.*, Oral Argument, 2002 WL 31748545, at \*34 (“QUESTION: [L]et’s assume . . . you think he’s going to blow up the World Trade Center. I suppose if . . . we have . . . this necessity exception, . . . you could beat him with a rubber hose.”).

Both the United States and the petitioner cited Justice Marshall’s dissent in *New York v. Quarles*, 467 U.S. 646, 686 (1984), for the proposition that “if a bomb is about to explode . . . the police are free to interrogate suspects without advising them of their constitutional rights.”

The Court pointedly declined these invitations. Five of the six opinions in the case rejected the position that torture or physical abuse to obtain information relevant to a government investigation is a constitutionally acceptable law enforcement technique whenever the information is not introduced at trial.<sup>73</sup> In this, they followed established law. Many cases constitutionally condemning physical abuse in the search for evidence as violating the minimum requirements of due process have involved the invalidation of convictions obtained on the basis of extorted confessions.<sup>74</sup> But

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The United States and the petitioner argued that the police were free to do much more.

73. *Chavez*, 538 U.S. at 773 (“Our views on the proper scope of the Fifth Amendment’s Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial”); *id.* at 773 (Stevens, J., concurring in part and dissenting in part) (concluding that the law is clear that “an attempt to obtain an involuntary confession from a prisoner by torturous methods . . . [is the] type of brutal police conduct [that] constitutes an immediate deprivation of the prisoner’s constitutionally protected interest in liberty.”); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part) (“use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”); *id.* at 801 (Ginsburg, J., concurring in part and dissenting in part) (quoting Justice Stevens on “torturous methods” and characterizing the type of procedure to be avoided: “It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence.”). Justice Souter, joined by Justice Breyer, was more measured in his comments, concluding that Justice Stevens had set forth a “serious argument” that the police conduct was unconstitutionally “outrageous.” *Id.* at 779. Justice Scalia, who joined Justice Thomas’s opinion, filed a separate opinion focused on a procedural objection to the outcome in the case. *Id.* at 780; *cf. McKune v. Lile*, 536 U.S. 24, 41 (2002) (distinguishing “the physical torture against which the Constitution clearly protects” from de minimus harms, against which it does not).

74. The first in this line was *Brown v. Mississippi*, 297 U.S. 278, 281-282 (1936), which involved convictions based on confessions resulting from investigations in which one defendant was “tied to a tree and whipped,” while two others were “made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it.” *See also Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (recounting police chief’s threat to suspect, “If you don’t tell the truth I am going to kill you,” and an officer’s subsequent firing of rifle next to suspect’s ear); *Clewis v. Texas*, 386 U.S. 707, 709-710 (1967) (suspect was arrested without probable cause, interrogated for nine days, sometimes with little food or sleep); *Reck v. Pate*, 367 U.S. 433, 435, 439-440 n.3 (1961) (mentally retarded youth who was interrogated incommunicado for a week, “during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher”); *Leyra v. Denno*, 347 U.S. 556, 558-561 (1954) (sleep-deprived suspect confessed after being questioned by state psychiatrist who offered to treat suspect’s “acutely painful attack of sinus”); *Malinski v. New York*, 324 U.S. 401, 403 (1945) (defendant held naked for three hours and questioned in hotel room for ten hours); *Ashcraft v. Tennessee*, 322 U.S. 143, 149-151 (1944) (defendant questioned for 36 straight hours without sleep); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (defendant moved “by night and day to strange towns, [told] of threats of mob violence, and [questioned] continuously” before giving confession); *Lisenba v. California*, 314

solid precedent also supports the further proposition that such physical abuse itself violates the mandates of the Due Process Clauses. Almost half a century ago, the Supreme Court upheld the criminal conviction of special police who physically abused a series of suspects. The police had sought confessions that would implicate the suspects' alleged accomplice. The Court reasoned that the physical abuse itself constituted a deprivation of constitutional rights under color of law.<sup>75</sup>

All of the Justices in *Chavez* accepted the proposition, based in *Rochin* and *County of Sacramento v. Lewis*, that egregious physical abuses in police questioning that "shock the conscience of the court" would violate the substantive requirements of the Due Process Clauses.<sup>76</sup> The Justices splintered, however, on whether the actions of Officer Chavez rose (or sank) to that level of egregiousness. Justices Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have relied on an absence of evidence that Officer Chavez "acted with a purpose to harm Martinez," interfered with his treatment, or "exacerbated [his] injuries or prolonged his stay in the hospital," and relied on a legitimate "need to investigate" the circumstances of the shooting, to conclude that no substantive due process violation had been

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U.S. 219, 230 (1941) (defendant held incommunicado, slapped, and allegedly beaten, leaving both ears swollen); *White v. Texas*, 310 U.S. 530, 532-533 (1940) (armed state rangers took defendant out of jail and into the woods for interrogation where they allegedly whipped him); *Chambers v. Florida*, 309 U.S. 227, 238-239 (1940) (defendants, black tenant farmers, were arrested without warrants and questioned in a "protracted" fashion "under circumstances calculated to break the strongest nerves and the strongest resistance").

75. *Williams v. United States*, 341 U.S. 97, 101 (1951) ("where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution"); *see also* *United States v. Price*, 383 U.S. 787, 793 & n.6 (1966) (holding that police officers who assaulted, shot, and killed civil rights workers violated due process rights, and quoting *Williams* on "beating and pounding until they confess"); *supra* text accompanying notes 61-63.

As the Court set forth the facts in *Williams*, 341 U.S. at 98-99, "A rubber hose, a pistol, a blunt instrument, a sash cord, and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed."

76. *Chavez*, 538 U.S. at 774 (Thomas, J., for the Court, joined by Rehnquist, C.J., and Scalia, J.); *id.* at 779 (Souter, J., concurring, joined by Breyer, J.); *id.* at 786 (Stevens, J., concurring in part and dissenting in part); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part, joined by Stevens and Ginsburg, JJ.) (under the Due Process Clause of the Fourteenth Amendment, the "use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person," citing *Rochin*).

alleged.<sup>77</sup> Justice Kennedy, joined by Justices Stevens and Ginsburg, thought it equally plain that because “the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions,” there was a clear constitutional violation; “no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement.”<sup>78</sup> Justice Souter, joined by Justice Breyer, filed a brief and cryptic concurring opinion stating that there was a “serious argument” in support of that claim, but in an opinion for the Court Justice Souter concluded that whether the actions amounted to a substantive due process violation should be resolved on remand.<sup>79</sup>

Although neither the Self Incrimination Clause nor the Eighth Amendment applies of its own force to investigatory torture, it is thus clear under current doctrine that brutal interrogation violates the constraints of substantive due process if its brutality “shocks the conscience of the court.” This conclusion, however, simply sets the terms of further discussion. The techniques which the Bush administration claims are not “torture” fall short of the pain of the thumbscrew, and only two Justices fully joined Justice Kennedy’s position in *Chavez* that “no reasonable police officer would have believed that the law

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77. *Chavez*, 538 U.S. at 775 (Thomas, J., for the Court, joined by Rehnquist, C.J., and Scalia, J.).

78. *Id.* at 796-799 (Kennedy, J., concurring in part and dissenting in part, joined by Stevens and Ginsburg, JJ.); *see also id.* at 788 (Stevens, J., concurring in part and dissenting in part) (concluding that “official interrogation of that character is a classic example of a violation of a constitutional right “implicit in the concept of ordered liberty”); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part, joined by Stevens, J.) (“A constitutional right is traduced the moment torture or its close equivalents are brought to bear”); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part, joined by Stevens and Ginsburg, JJ.) (“torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person”); *id.* at 801 (Ginsburg, J., concurring in part and dissenting in part) (reasoning that due process and self-incrimination protections are aligned with the “struggle to eliminate torture as a governmental practice”).

79. *Id.* at 779 (Souter, J., for the Court in part, and concurring in part, joined by Breyer, J.). Justice O’Connor’s position on this issue does not seem to be recorded. As noted, Justice O’Connor seems to join none of the opinions on this point. *Cf. Oregon v. Elstad*, 470 U.S. 298, 314 n.3 (1985) (O’Connor, J., writing for the Court, taking as a given that a confession “obtained through overtly or inherently coercive methods” would “raise serious Fifth Amendment and *due process* concerns”) (emphasis added).

On remand, the Ninth Circuit was equally abrupt, but more emphatic, holding tersely that the plaintiff’s claim was viable because “[a] clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation.” *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003). The United States filed an unusual amicus brief joining in an effort to induce the Ninth Circuit to rehear the case en banc, but the court declined to do so. 354 F.3d 1168 (9th Cir. 2004).

permitted him to prolong or increase pain to obtain a statement.”<sup>80</sup> Would the “cruel, inhuman or degrading” treatment of “torture lite” shock the judicial conscience? Conversely, will a claim of sufficiently compelling circumstances assuage brutality’s shock?

### *B. The Conscience of the Court*

#### *1. What’s Wrong with the Rack and Screw?*

In sounding the depths of the judicial conscience that finds the “rack and screw” repugnant, it is worth beginning with the basis for that revulsion. Torture is alien to our Constitution because it is a cruel assault on the bodily integrity, the autonomy, and the dignity of the victim.

##### *a. Bodily Integrity*

Torture, like most of the “cruel, inhuman or degrading” treatment of “torture lite,” involves an assault on the body.<sup>81</sup> From the early days of the Republic, security against government deployment of force against the bodies of the citizenry has been a defining characteristic of the American constitutional system. Protection against physical assault by the government is one of the hallmarks of a free people. The Fourth Amendment protects the “person” against unreasonable searches and seizures; the Fifth Amendment’s protection of “liberty” against deprivation without due process builds on Blackstone’s definition of liberty as including personal security.<sup>82</sup>

This concern for bodily integrity draws force as well from the background of the Thirteenth Amendment’s ban on slavery. Before the Civil War, one of the differences in American law between slavery and other domestic relations was precisely that the body of the slave was subject to the master’s “uncontrolled authority”; physical assault therefore could yield no legal redress.<sup>83</sup> Indeed, an action for battery against the purported master was a

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80. *Chavez*, 538 U.S. at 798 (Kennedy, J., concurring in part and dissenting in part, joined by Stevens and Ginsburg, JJ.).

81. Note that some forms of “stress and duress” involve sensory deprivation, rather than sensory assaults.

82. *Ingraham v. Wright*, 430 U.S. 651, 661 (1977) (“Blackstone catalogued among the ‘absolute rights of individuals’ the right ‘to security from the corporal insults of menaces, assaults, beating, and wounding’”) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*134).

83. See *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829) (recognizing “absolute” authority of the master over the slave’s body); *Commonwealth v. Turner* 26 Va. (5 Rand.) 678 (1827) (sustaining the master’s demurrer to indictment on a charge of beating his slave); see also ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE

standard form of legal suit to establish the freedom of the plaintiff.<sup>84</sup> A constitutional prohibition of slavery brings with it a presumption that the bodies of human beings under American control are subject to the “uncontrolled authority” neither of the government nor of any private party. As Justice O’Connor has observed, “our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination.”<sup>85</sup>

*b. Pain, Suffering, and Autonomy: The Meaning of Torture*

Torture, of course, is not a mere infringement on bodily integrity. It is an infringement designed to produce pain sufficient to loosen the tongue of its

LAW OF SLAVERY IN THE U.S. SOUTH 3 (1992); ORLANDO PATTERSON, *SLAVERY & SOCIAL DEATH: A COMPARATIVE STUDY* 1-5 (1982). The master’s authority did not extend to killing the slave, and some states by statute prohibited “cruel and unusual” punishments of slaves. Whipping, however, was the normal mode of punishment on plantations, LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 85-87 (1993), and for antebellum antislavery forces, “whipping symbolically condensed the evils of tyranny and barbarism.” MICHAEL MERANZE, *LABORATORIES OF VIRTUE* 296 (1996).

84. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (dismissing, for want of diversity jurisdiction, a slave’s suit for battery committed by his master).

85. *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring); see also *Sell v. United States*, 539 U.S. 166, 176 (2003) (reiterating that “involuntary medical treatment raises questions of clear constitutional importance” under the Due Process Clause); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“Liberty specially protected by the Due Process Clause includes the right[] to . . . bodily integrity . . .”); *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (“It is settled now . . . that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about . . . bodily integrity.”); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (holding that due process prevents a person detained for trial from being forced to take antipsychotic drugs “absent a finding of overriding justification and a determination of medical appropriateness”); *Cruzan*, 497 U.S. at 278-279 (a “liberty interest” to refuse “unwanted” medical care may be inferred from prior cases under the Due Process Clause); *Washington v. Harper*, 494 U.S. 210, 221-223 (1990) (establishing a prisoner’s due process right to be free from forced antipsychotic drug therapy absent justification); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O’Connor, J., concurring in part and dissenting in part) (“Our Constitution’s promise of due process of law guarantees” at least compensation for violations of the principle stated by the Nuremberg Military Tribunals “that the ‘voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical, and legal concepts.’” (citation omitted)); *Winston v. Lee*, 470 U.S. 753 (1985) (forbidding invasive surgical search authorized by warrant); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (recognizing that the Due Process Clause protects a “right to freedom from bodily restraint” that survives involuntary commitment to state institution for the mentally retarded); *Schmerber v. California*, 384 U.S. 757, 772 (1966) (“The integrity of an individual’s person is a cherished value of our society.”); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (refusing court-compelled medical examination of plaintiff upon pretrial application by defendant).

victim. Both the Eighth Amendment's stricture against cruel punishment and the anti-torture background of the Self Incrimination Clause bespeak hostility to such a practice. Justice Kennedy in *Chavez* took the position that "no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement."<sup>86</sup> So, too, in *Washington v. Glucksberg* Justice Stevens would have held that "avoiding intolerable pain" was a virtually infeasible individual right,<sup>87</sup> and Justices O'Connor, Ginsberg, and Breyer approved the prohibition on assisted suicide at issue in that case only because state law permitted palliative interventions sufficient to avoid agony.<sup>88</sup>

This perception is not a new one. Even before the Court applied the Fifth Amendment's protections against self incrimination to the states, torture to obtain criminal convictions was viewed as outside the moral universe delineated by the Constitution: "The rack and torture chamber may not be substituted for the witness stand."<sup>89</sup> Likewise, it has been clear for over a century that one of the core elements of the Eighth Amendment's prohibition against cruel and unusual punishment is its bar to the imposition of torture or its equivalent.<sup>90</sup> Almost three decades ago the Court concluded in *Estelle v. Gamble* that deliberate indifference to serious medical needs of prisoners can impose constitutionally impermissible "wanton and unnecessary" pain.<sup>91</sup> One of the examples cited by the Court in *Estelle* as "cruel and unusual punishment" was refusal to administer a prescribed pain killer to prisoners after surgery.<sup>92</sup> If there is physical pain that cannot be legitimately inflicted on prisoners in retaliation even for the most heinous of crimes, the state similarly may not inflict it on individuals who have not even been

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86. *Chavez v. Martinez*, 538 U.S. 760, 798 (2003) (Kennedy J., concurring in part and dissenting in part).

87. *Glucksberg*, 521 U.S. at 745 (Stevens, J., concurring in the judgments).

88. *Id.* at 737 (O'Connor, J., concurring, joined by Ginsburg and Breyer, JJ.) (noting that a patient "experiencing great pain" is not barred from receiving painkilling medicines that might hasten death); *id.* at 791 (Breyer, J., concurring) (observing that the laws under review did not block a patient from "avoidance of severe physical pain"); see Seth F. Kreimer, *The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of Roe v. Wade*, 24 HASTINGS CONST. L.Q. 863, 887-901 (1997) (discussing the role of pain in the analysis in *Glucksberg*).

89. *Brown v. Mississippi*, 297 U.S. 278, 285-286 (1936) (citation omitted).

90. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("punishments of torture . . . are forbidden by that Amendment"); *In re Kemmler*, 136 U.S. 436, 446 (1890) (reasoning that the Eighth Amendment prohibits Congress from allowing such punishments as "burning at the stake, crucifixion, breaking on the wheel, or the like").

91. 429 U.S. 97, 104 (1976); cf. *West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring) (construing allegations of prisoner subjected to pain by a doctor's refusal to perform surgery as raising a due process claim rather than an Eighth Amendment one).

92. 429 U.S. at 104 n.10.

prosecuted.<sup>93</sup> Although the Court may properly hesitate in imposing controversial value choices under the rubric of due process, the proposition that the government is constitutionally constrained from intentionally imposing agony on its subjects does not appear to raise contentious normative issues.

Even in a regime of negative constitutional rights, the Court has recognized that when the government takes custody of an individual and renders her helpless, it has a duty to assure her physical safety and minimal human needs.<sup>94</sup> Torture and “torture lite” flout this duty. They inflict agony on the helpless; they are thus at odds with the constitutionally legitimate role of the state. One of Orwell’s final comments in *Nineteen Eighty-Four* is, “If you want a picture of the future, imagine a boot stamping on a human face – forever.”<sup>95</sup> This image repels us precisely because it is the antithesis of the legitimate relation between the state and those subject to its power.

## 2. “Justifiable Violations”?

Not every governmental action that results in pain or impinges on bodily integrity is barred by the Constitution. A state may uncontroversially require smallpox vaccinations in the midst of a threatened epidemic;<sup>96</sup> a prison guard

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93. See *Youngberg v. Romeo*, 457 U.S. 307, 321-322 (1982) (“Persons who have been involuntarily committed are entitled to more considerate treatment . . . than criminals”); *Revere v. Mass. Gen. Hospital*, 463 U.S. 239, 244 (1983) (holding that a person “injured while being apprehended by police” has due process rights “at least as great” as the Eighth Amendment rights of a prisoner); *Bell v. Wolfish*, 441 U.S. 520, 535-536 nn.16-17 (1979) (distinguishing the due process right of a pretrial detainee from the Eighth Amendment right of a sentenced inmate).

Indeed, in his concurrence in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 469 (1947), Justice Frankfurter viewed this prohibition of willful infliction of great physical cruelty as part of the due process protection of a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Cf. West*, 487 U.S. 42 at 58 (Scalia, J., concurring), discussed *supra* note 66.

94. *DeShaney v. Winnebago County Dep’t of Social Servs.*, 489 U.S. 189, 200 (1989) (“when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action”), *quoted in County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998).

95. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 271 (1949).

96. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding state’s mandatory vaccinations as a valid exercise of police power).

may concededly use firearms to quell a prison riot;<sup>97</sup> a police officer may unquestionably use appropriate force to subdue a resistant suspect.<sup>98</sup> Can the principles that justify such actions similarly come to constitutionally justify torture in sufficiently desperate circumstances?

*a. Purposeless Restraints?*

One formulation of the demands of substantive due process suggests that it bars “arbitrary impositions and purposeless restraints” on liberty.<sup>99</sup> So, too, there is language in Eighth Amendment precedents that the Cruel and Unusual Punishment Clause bars “unnecessary and wanton” infliction of pain.<sup>100</sup> Some of the abuses held to violate the constitutional protections against official abuse have been entirely without public justification.<sup>101</sup> There is reasoning in some of the Administration’s legal apologia that suggests that this is the sum of the constraints they recognize.<sup>102</sup> If an American official were to subject a person to physical agony out of personal spite, or because that person

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97. *See* *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (holding that the shooting of a prisoner in the course of quelling a riot did not violate the Eighth Amendment).

98. *See* *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (allowing use of deadly force where the “officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others”).

99. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), *quoted in* *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring); *Planned Parenthood v. Casey*, 505 U.S. 833, 848-849 (1992) (plurality opinion).

100. *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (“[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” (quoting *Whitley*, 475 U.S. at 319)). This standard of “unnecessary and wanton infliction of pain” has been used repeatedly by the Supreme Court. *See, e.g.,* *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) (“The unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (“Unnecessary and wanton infliction of pain implicates the Eighth Amendment.”); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (pain “totally without penological justification” is among that pain which is “unnecessary and wanton”); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *cf. Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (finding no cruelty where there was “no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution”).

101. *See, e.g.,* *United States v. Lanier*, 520 U.S. 259 (1997) (vacating dismissal of the civil rights prosecution of a state judge who sexually assaulted and orally raped litigants and employees); *Hudson*, 503 U.S. at 4 (recounting that, while prisoner was in handcuffs and shackles, one guard punched him in the “mouth, eyes, chest, and stomach” while another “held the inmate in place and kicked and punched him from behind”); *United States v. Price*, 383 U.S. 787, 795 (1966) (describing the purposeful release of inmates so they could be murdered).

102. *See, e.g.,* *Beaver Memorandum*, *supra* note 12 (DANNER at 176).

resembles the profile of a “terrorist,” or in order to intimidate a population by showing the barbarity of which the American government is capable, even the current administration acknowledges that this would violate the demands of due process.

Even the most “forward leaning” members of the Bush administration do not overtly suggest rounding up people who look like terrorists and abusing them simply in hopes of intimidating future attackers, or subjecting terrorists in custody to “torture lite” for purpose of revenge. Rather, the argument is that “torture lite” could be necessary to prevent disaster, or at least to reduce the probability of successful future terrorist attacks. This purpose is certainly a legitimate one. Does this mean that a government in search of information engages not in “purposeless” but “purposeful” deprivations of liberty or “necessary” imposition of pain and therefore acts constitutionally when it tortures?

The demands of due process are not so anemic. In the root case, *Rochin v. California*, the actions of the police arose not from gratuitous cruelty or personal spite, but from tangible law enforcement objectives.<sup>103</sup> The effort to seize evidence in order to enforce duly promulgated criminal penalties against drug possession was eminently reasonable as an instrumental matter; indeed, once the drugs had been swallowed, no less intrusive alternative could achieve the objective. Nonetheless, the Court found the deputy sheriffs’ actions to be unconstitutionally shocking to the judicial conscience. If *Rochin* is the model, therefore, the issue cannot simply be whether the cruelty at issue seeks to achieve a legitimate objective.

#### *b. Balancing?*

When protection of liberty contends with vindication of public interest, due process analysis often adopts a rhetoric of balancing or comparison.<sup>104</sup>

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103. The Court in *Sacramento v. Lewis* observed that in *Rochin*, “the case in which we formulated and first applied the shocks-the-conscience test, it was not the ultimate purpose of the government actors to harm the plaintiff, but they apparently acted with full appreciation of what the Court described as the brutality of their acts.” 523 U.S. 833, 849 n.9 (1998). The Court also reiterated that failure “to provide . . . basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety” – to those in government custody “transgresses the substantive limits on state action set by the . . . Due Process Clause.” *Id.* at 851 (second ellipsis in original) (citation omitted). Torture is, of course, the polar opposite of the constitutionally required “reasonable provisions for the [prisoner’s] welfare.” *Id.* at 852 n.12.

104. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 320-321 (1982) (advocating the process of weighing “the individual’s interest in liberty against the State’s asserted reasons for restraining individual liberty,” but determining that “this balancing cannot be left to the unguided discretion of a judge or jury”); *Washington v. Glucksberg*, 521 U.S. 702, 767-768

The presence of a legitimate purpose is not enough to legitimate a severe imposition unless the weight of the purpose is commensurate to the imposition.

Such a balancing standard would place constitutional constraints on the use of torture and “torture lite.” If the magnitude of the interest necessary to justify an intervention rises with its intrusiveness on bodily autonomy, health, and safety, surely torture and its cognates lie at the top of the scale. Even the “stress and duress” techniques of “torture lite” would require quite substantial justification under an arithmetic balancing test; the mere possibility of obtaining useful information for the “war on terror” or the suppression of an insurgency should not be sufficient, even after 9/11. The struggle against illegal narcotics was viewed as an important public interest, but it was not adequate to justify pumping Rochin’s stomach; torturing him to reveal the location of his stash would be equally improper.

Notwithstanding the tendency of some analysts to gravitate toward “ticking bomb” scenarios (where only the captured terrorist knows the location of a devastating device about to explode), in real life authorities are likely to seek information by employing abusive interrogation in situations substantially less clearcut and compelling. The suspect may be innocent or ignorant, her information may be of only collateral or speculative value, the device may not

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(1997) (Souter, J., concurring) (“Approach calls for a court to assess the relative ‘weights’ or dignities of the contending interests . . . . When the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied [it will violate due process] . . . .”); *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 279 (1990) (reasoning that the scope of substantive due process rights is “determined by balancing [the individual’s] liberty interests against the relevant state interests” (quoting *Youngberg*, 457 U.S. at 321)); *Washington v. Harper*, 494 U.S. 210, 236 (1990) (approving “an accommodation between an inmate’s liberty interest in avoiding the forced administration of antipsychotic drugs and the State’s interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others”); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (comparing an individual’s right “that his person be held inviolable” with “the interests of society in the scientific determination of intoxication”); *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905) (balancing individual’s liberty interest in being free from fine or imprisonment for not getting vaccinated against the state’s interest in protecting public health).

In *Youngberg*, the Court concluded that in a state-run hospital the state had “the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. The Court also declared that the state may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training.” 457 U.S. at 324.

exist, or alternative sources of information may be available.<sup>105</sup> In these cases, even a cost/benefit analysis of “reasonableness” that allows possible public gains to justify proportionately uncivilized behavior, if fairly applied, does not authorize physical abuse simply because there is a risk of substantial public harm at stake. The requirement must be that the incremental gain in avoiding harm that can be achieved by abuse be sufficient to justify the harm imposed on the abused individual. A speculative and minor benefit in the future should not be said reasonably to justify the real and present imposition of agony on a real person screaming under the authorities’ ministrations.

On the other hand, as the perceived public dangers increase, if only an arithmetic balance is required, the constraint on abuse may fade entirely. A sufficiently large fear of catastrophe could conceivably authorize almost any plausibly efficacious government action.<sup>106</sup> Even a small increase in the probability of avoiding a nuclear or biological holocaust could be argued to justify almost any harm to a single individual. The danger, to paraphrase Ivan Karamazov, is that since almost 3,000 victims of September 11 are dead, everything is permitted. This, indeed, seems to be the approach adopted by both the Bybee Memo and the Working Group Report in their analyses of the “necessity” defense for torturers. Lest I be accused of parody, let me quote the actual words that recur in each report: “a detainee *may* possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, *any* harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives.”<sup>107</sup>

This approach misreads the nature of the inquiry of substantive due process. A number of substantive due process cases speak in terms of “accommodation” of competing interests on the basis of their “weights.” But that “accommodation” reaches beyond arithmetic proportionality; the underlying question is whether a particular accommodation is consistent with the “essence of a scheme of ordered liberty” and the “traditions and conscience

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105. On the tendency of real world instances of torture and torture lite in the global war on terror to diverge from the “ticking bomb” scenario, see Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism,”* 1 J. NAT’L SECURITY L. & POL’Y 285 (2005).

106. This was the essence of the analysis in *Dennis v. United States*, 341 U.S. 494, 509 (1951) (overruled in *Brandenburg v. Ohio*, 394 U.S. 444 (1969)), which accepted the government’s argument that the magnitude of the harm associated with Communist subversion justified curtailment of First Amendment rights, even absent a likely or present danger.

107. Bybee Memo, *supra* note 8, at 41 (DANNER at 151) (emphasis added); Working Group Report, *supra* note 15, at 26 (emphasis added).

of our people.”<sup>108</sup> In a nation that finds guidance in the Eighth and Thirteenth Amendments, torture cannot be justified on grounds of public necessity. The words of the Eighth Amendment prohibit “cruel and unusual” punishments; torture is both cruel and unusual today, as it was when the Amendment was adopted. The judicial gloss on the Eighth Amendment prohibits “wanton and unnecessary” imposition of pain. In the abstract, one might argue that the pain of the torture contemplates only “necessary” pain. But the rack and the screw were viewed as entirely necessary by those who wielded them,<sup>109</sup> and slaves were often whipped not out of spite but out of utilitarian rationality. The “third degree” was viewed as a necessary means in the war against crime, and the “torture lite” practiced in the prison camps of Mississippi was viewed as an appropriate and milder penological alternative to the lash as a way of controlling obstreperous prisoners.<sup>110</sup> The heritage of the Eighth and Thirteenth Amendments permits none of this.

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108. *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937); *see, e.g., Chavez v. Martinez*, 538 U.S. 760, 787 (2003) (Stevens, J., concurring in part and dissenting in part) (citing *Palko*); *Sacramento*, 523 U.S. at 847 (same); *Lawrence v. Texas*, 539 U.S. 558, 593 n.3 (2003) (Scalia, J., dissenting) (inquiring into whether the right claimed is “implicit in the concept of ordered liberty”); *Sell v. United States*, 539 U.S. 166, 180 (2003) (also stressing concept of “ordered liberty”). *Palko* itself, while rejecting the proposition that immunity “from compulsory self-incrimination” was part of the “essence of a scheme of ordered liberty,” went on to observe, “No doubt there would remain the need to give protection against torture, physical or mental.” 302 U.S. at 325-326.

109. *Cf. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 16-17 (1977); EDWARD PETERS, *TORTURE* (expanded ed. 1996); Mrijan Damaška, *The Death of Legal Torture*, 87 *YALE L.J.* 860, 876-877 (1978) (book review) (describing Continental claims that torture was necessary to prevent crime). One opponent of the adoption of the Eighth Amendment put the matter as follows: “it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? . . . [U]ntil we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.” House of Representatives, *Amendments to the Constitution*, 1 *Annals of Cong.* 782-783 (Joseph Gales ed., 1789) (Mr. Livermore).

110. *See, e.g., Bogard v. Cook*, 586 F.2d 399, 402, 404, 407, 419 (5th Cir. 1978) (describing the “coke crate punishment (being forced to stand for a long period of time on a small wooden box)”; the practice of placing inmates in a 6’ x 6’ cell, known as the “dark hole cell, naked, without any hygienic materials, bedding, adequate food, or heat”; “stripping inmates of their clothes, turning the fan on inmates while naked and wet . . . handcuffing inmates to the fence and to cells for long periods of time”; “Mr. Cook defended the use of the dark hole as a necessary type of psychological punishment for inmates who are obstreperous, obstinate violators of penitentiary discipline, and favored that method in preference to inflicting corporal punishment by the lash.”).

Rather, the parameters of legitimate governmental action are set by the Court’s observation in *Hudson v. McMillian*,<sup>111</sup> holding that beating of an inmate by prison guards violates the Eighth Amendment:

[A]n Eighth Amendment claim is . . . contextual and responsive to “contemporary standards of decency.” For instance, extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is “part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life’s necessities are sufficiently grave to form the basis of an Eighth Amendment violation.” . . . In the excessive force context, society’s expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.<sup>112</sup>

c. “Traditions from Which It Broke”

These constitutional constraints on brutality cannot be explained by an arithmetic proportionality. Rather, they reflect the nature of the society from which our public tradition arises and which it reciprocally constitutes. In evaluating accommodations between order and liberty, as Justice Harlan observed, the Court must have regard for the traditions of our country, both the “traditions from which it developed as well as the traditions from which it

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111. 503 U.S. 1 (1992).

112. *Id.* at 8-9 (internal citations omitted); *see also id.* at 13 (Blackmun, J., concurring) (“Indeed, were we to hold to the contrary, we might place various kinds of state-sponsored torture and abuse – of the kind ingeniously designed to cause pain but without a telltale “significant injury” – entirely beyond the pale of the Constitution.”); *cf. id.* at 26 (Thomas, J., dissenting) (“Many things – beating with a rubber truncheon, water torture, electric shock, incessant noise . . . may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks.”). *See generally* *Hope v. Pelzer*, 536 U.S. 730, 734-735 (2002) (holding that it was unconstitutional to shackle an inmate to a hitching post for total of nine hours on two days).

broke.”<sup>113</sup> Those traditions have no place for official torture or cruel, inhuman, or degrading treatment.

Though torture was not entirely absent in 15th and 16th century English practice, it was always exceptional, and the common law by the time of Blackstone excluded torture for purposes of obtaining information.<sup>114</sup> Like Blackstone, the Framers of the American Constitution viewed torture as a mechanism associated with the vices of Continental despotism. Thus, Patrick Henry objected in the Virginia ratifying convention to the absence of a prohibition on torture:

What has distinguished our ancestors? – That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany – of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.<sup>115</sup>

113. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”), *quoted in* *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992); *cf. Lawrence*, 539 U.S. at 571 (“In all events we think that our laws and traditions in the past half-century are of most relevance here.”); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (beginning due process analysis “by examining our Nation’s history, legal traditions, and practices” (citing *Casey*, 505 U.S. at 849-850, and *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 269-279 (1990))); *Glucksberg* at 764 (Souter, J., concurring in the judgment) (“Clashing principles . . . [are] to be weighed within the history of our values as a people.”).

114. 4 WILLIAM BLACKSTONE, COMMENTARIES \*325-329; *see* LANGBEIN, *supra* note 109, at 139 (“For the future of common law criminal procedure, the English experiment with torture left no traces.”); 5 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 184 (1927) (“it is clear from the works of Fortescue, Smith, and Coke, and from the resolution of the judges in *Felton’s Case*, that the use of torture was wholly contrary to the common law.”).

115. 3 ELLIOT’S DEBATES 447-448 (1863); *see also id.* at 452:

Mr. George Mason replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

*See generally* WILLIAM PENN, THE EXCELLENT PRIVILEGE OF LIBERTY AND PROPERTY BEING

These origins have regularly been cited as constitutive of our constitutional tradition.<sup>116</sup>

This rejection of torture as alien to the heritage of English liberty held sway through the early decades of the Republic;<sup>117</sup> when European governments moved to eliminate official torture in the late eighteenth and early nineteenth century, America applauded.<sup>118</sup>

The replacement of local justices of the peace with extensive police forces charged with investigating and suppressing crime in late nineteenth and early twentieth century America was accompanied by organized physical abuse of suspects designed to achieve those ends;<sup>119</sup> the term “third degree” gained currency among American police officials during the early twentieth century.<sup>120</sup> “Third degree” brutality by police officials, however, was judged

THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND (Philobiblon Club 1687), at 12 (“In France, and other nations, . . . if any two villains will but swear against the poor party, his life is gone; nay, if there be no witness, yet he may be put on the rack, the tortures whereof make many an innocent person confess himself guilty, and then, with seeming justice, is executed.”).

116. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 170 n.17 (1976) (citing Patrick Henry’s remarks); *Culombe v. Connecticut*, 367 U.S. 568, 581 n.23 (1961) (same); *Chambers v. Florida*, 309 U.S. 227, 236 n.9 (1940) (citing *Weems v. United States*, 217 U.S. 349, 371-373 (1910), for Henry’s remarks).

117. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §1782 (1833) (Self Incrimination Clause “is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt.”); *Culombe*, 367 U.S. at 581 (recognizing the constitutional status of “a cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it. Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime. . . . This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments.”).

118. For accounts of the Continental abandonment of torture, see LISA SILVERMAN, TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE (2001); MALCOLM EVANS & ROD MORGAN, PREVENTING TORTURE 7-13 (1998); EDWARD PETERS, TORTURE 73-75, 99-102 (1985); Damaška, *supra* note 109, at 876-883. For American reactions, see, e.g., HENRY CHARLES LEA, SUPERSTITION AND FORCE (Barnes & Noble 1996) (1866).

119. See PETERS, *supra* note 118, at 111-112; Office of Legal Policy, Dep’t of Justice, *The Law of Pretrial Interrogation*, 22 U. MICH. J.L. REF. 437, 463 (1989) (observing that as the “locus of interrogation moved from the courtroom to the stationhouse . . . [t]he use of ‘third degree’ methods by the police to obtain confessions became common, and persisted as a widespread practice until at least the 1930s”).

120. Richard Sylvester, *A History of the “Sweat Box” and the “Third Degree,”* in THE BLUE AND THE BRASS: AMERICAN POLICING: 1890-1910, at 72-73 (Donald C. Dilworth ed., 1976); National Comm’n on Law Observance and Enforcement, *Pub. No. 11, Report on*

constitutionally anathema by the Supreme Court following the exposure and condemnation of the practice by such authorities as the American Bar Association and the Wickersham Commission in the early 1930s.<sup>121</sup> That official rejection was reinforced by the revulsion against torture as characteristic of America's totalitarian enemies.<sup>122</sup> Thus, American law

*Lawlessness in Law Enforcement* 20 (1931) [hereinafter Wickersham Comm'n]. Professor Friedman reports that the term was used as early as 1887. FRIEDMAN, *supra* note 83, at 501 n.18.

121. Wickersham Comm'n, *supra* note 120, at 5 ("the practice is shocking in its character and extent, violative of American traditions and institutions, and not to be tolerated"); see Emanuel H. Lavine, *The Third Degree: A Detailed and Appalling Expose of Police Brutality* (1930) (report of American Bar Ass'n Comm. on Lawless Enforcement of the Law); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 61-66 (1993).

Numerous opinions cite the Wickersham Commission report and condemn police use of third degree methods as unconstitutional. See, e.g., *Culombe*, 367 U.S. at 571-574 nn.3, 6 & 8 (citing Wickersham Comm'n) (describing the pressure police feel to coerce a confession); *Williams v. United States*, 341 U.S. 97, 101 (1951) ("Where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution."); *Malinski v. New York*, 324 U.S. 401, 407 (1945) (stating that the coerced confession was one of fear, on the basis of which the court could not permit a person to stand convicted of a crime); *Ashcraft v. Tennessee*, 322 U.S. 143, 149-150 nn.4-5, 151-152 (1944) (citing Wickersham Comm'n) (portraying the various intimidation tactics employed by officers in an attempt to get a confession); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (holding that a prisoner's confession was not free and voluntary, but given under duress); *White v. Texas*, 310 U.S. 530, 533 (1940) (citing *Chambers v. Florida*, 309 U.S. 227, 241 (1940)) ("Due Process of law . . . commands that no such practice . . . shall send any accused to his death."); *Chambers*, 309 U.S. at 238 n.11, 240 & n.15 (citing Wickersham Comm'n) (asserting that the third degree is often used against the poor and has caused a general unwillingness to cooperate); see also *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners.").

Compare *McNabb v. United States*, 318 U.S. 332, 344 (1943) (stating that the requirement of speedy arraignment seeks to avoid police having to "resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use"), with *Ashcraft*, 322 U.S. at 160 (Jackson, J., dissenting) ("Interrogation per se is not, while violence per se is, an outlaw.")

122. See, e.g., *Chavez v. Martinez*, 538 U.S. 760, 788 (2003) (Stevens, J., concurring in part and dissenting in part) (deploring "the kind of custodial interrogation that was once employed by the Star Chamber, by 'the Germans of the 1930's and early 1940's,' and by some of our own police departments only a few decades ago" (quoting *Oregon v. Elstad*, 470 U.S. 298, 371 (1985) (Stevens, J., dissenting))).

In *Chambers*, the Court noted:

Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not

enforcement officially renounced third degree techniques three generations ago.<sup>123</sup> By the middle of the twentieth century, the Court could declare:

The argument that without such interrogation it is often impossible to close the hiatus between suspicion and proof, especially in cases involving professional criminals, is often pressed in quarters responsible and not unfeeling. It is the same argument that was once invoked to support the lash and the rack. . . . The Constitution

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conform and who resisted tyranny. . . . The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake, and the hangman’s noose.

309 U.S. at 236-238. So, too, Justice Blackmun argued in *Hudson v. McMillian* that the Constitution prohibits

state-sponsored torture and abuse – of the kind ingeniously designed to cause pain but without a telltale “significant injury” [such as] lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs. These techniques, commonly thought to be practiced only outside this Nation’s borders, are hardly unknown within this Nation’s prisons.

503 U.S. 1, 13-14 (1992) (Blackmun, J., concurring in the judgment).

One of the counts in the Nuremberg indictment of Gestapo officials detailed official orders approving the application of “third degree” techniques, including “[a] very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, [and] flogging (for more than 29 strokes a doctor must be consulted)” as a means of obtaining “information of important facts” regarding subversion. 2 OFFICE OF THE U.S. CHIEF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 295 (1946), available at <http://www.ess.uwe.ac.uk/genocide/Gestapo6.htm>; see also PETERS, *supra* note 118, at 124-125. One of the defenses raised by Gestapo officers was that such actions were necessary to protect against Resistance terrorism. 20 TRIAL OF GERMAN MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: PROCEEDINGS, ONE HUNDRED AND NINETY-SECOND DAY (1946) (containing testimony of witness Karl Heinz Hoffman: “Third degree was carried out during interrogations. To explain this I have to point out that the resistance organizations occupied themselves with the following: First, attacks on German soldiers . . .”), available at <http://www.yale.edu/lawweb/avalon/imt/proc/08-01-46.htm>. See generally The Nizkor Project, at <http://www.nizkor.org> (providing numerous Nuremberg trial documents).

123. See Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, in 18 CRIME, LAW & SOC. CHANGE 35, 49 (1992) (detailing condemnation of third degree practices by police chiefs during 1940s); President’s Comm’n on Law Enforcement & Admin. of Justice, *The Challenge of Crime in a Free Society* 93 (1967) (“today the third degree is almost nonexistent. . . . [F]ew Americans regret its virtual abandonment by the police.”).

proscribes such lawless means irrespective of the end.<sup>124</sup>

That conclusion is no less true today. In reconciling order and liberty, American traditions have denounced the use of torture and its cognates not because such measures are irrational, but because they corrode the core of our liberty and of our national identity. Even the Bush administration is unwilling to claim publicly that “cruel, inhuman or degrading treatment” is consistent with American values. It maintains that its policy is to treat prisoners “humanely,” while, with the fine hypocrisy that marks the homage of vice to virtue, it defines “torture lite” as humane.

#### IV. CONSCIENCE AND ACTION: THE ROLE OF PUBLIC VALUES

If torture and “torture lite” could be confined to a limited situation in which they were the only way of preventing vast devastation, there are good

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124. *Culombe*, 367 U.S. at 587-588. Other examples of public policies that predictably result in the risk of physical harm or pain are entirely distinguishable from interrogational torture. A military draft subjects citizens to the possibility, not the assurance, of physical danger, and in any event is governed by the laws of war, which prohibit torture. A prohibition of the abortion of a viable fetus occupies the body of the woman but does not impose torturous pain, for the woman can always seek anesthesia, and in any event a threat to the “health of mother” will justify an abortion. *Jacobson v. Massachusetts*, 197 U.S. 11, 38-39 (1905), permitted mandatory smallpox vaccination but assumed that courts would protect a patient if the vaccination would “seriously impair his health” or result in “cruel or inhuman” impositions. Mandatory medical procedures have been upheld under due process scrutiny only where they are in the medical interest of the patient, a situation hardly applicable to interrogational torture. *Sell v. United States*, 539 U.S. 166, 179 (2003); *Washington v. Harper*, 494 U.S. 210, 221-222, 227 (1990).

Deployment of deadly force to prevent flight of a dangerous felon, approved in some circumstances in *Tennessee v. Garner*, 471 U.S. 1, 14 (1985), may be justified by the magnitude of a contingent threat, by the felon’s defiance of public order, and by the threat that the felon personally poses to law enforcement and the citizenry. By definition, a suspect under interrogation poses no similar threat. It is precisely her helplessness that makes the torture repulsive. Notwithstanding the “importance” of the law enforcement effort, the doctrine of *Tennessee v. Garner* would not countenance pistol whipping an apprehended knife-point mugger into revealing the whereabouts of an accomplice who had escaped.

It could be that the suspect violates a law by refusing to answer a legitimate grand jury inquiry, or by giving a misleading answer to law enforcement officials. But *Tennessee v. Garner* would not countenance the deployment of lethal force generally either to apprehend fleeing perjurers or to coerce contumacious witnesses. After appropriate process the recalcitrant suspect may be incarcerated indefinitely or subjected to heavy fines or imprisonment. But no matter how important the interest that the state pursues, the punishment for such a fault cannot involve barbarity precluded by the Eighth Amendment. It would be an odd result, indeed, if the state were able to impose heavier sanctions without judicial process than those available with it.

faith arguments that, as a matter of both policy and public ethics, an official might choose to violate the law and otherwise peremptory moral norms by ordering such torture. Yet even if torture might at times be an ineluctable necessity, on other occasions it will wreak human havoc without any discernible, much less proportionate, public benefit, and sometimes any possible benefits could be achieved without resort to torture.<sup>125</sup> If current events are any indication, there is every reason to believe that torture or “torture lite,” if recognized as legitimate, will be deployed frequently in those latter cases.

In the current “global war on terror,” the most charitable interpretation of events is that techniques initially approved for use by experienced interrogators against a few hardened members of al Qaeda migrated in short order to the repertoire of National Guard members holding thousands of Iraqis who had annoyed occupying forces. This should come as no surprise. The tendency of brutality to escalate in prison settings is a well-established observation of social psychology and political experience.<sup>126</sup> Yet even if physical abuses were limited to a corps of professional “stress and duress experts” (to use the most antiseptic euphemism I can generate), a legal regime that allows a sliding scale of justifications for “torture lite” is likely to encourage such officials to yield to what General Jacques de Bolladiere

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125. In 1956, following the deployment of torture in the Battle of Algiers, Paul Teitgen, the secretary-general of the Algiers prefecture, resisted the pressure of his chief of police to torture a terrorist who had been apprehended placing a bomb in a gasworks. A second bomb was allegedly set to explode in the gasworks, potentially triggering an explosion of stored gas that would endanger the entire city. In fact, no second bomb exploded, and it is not clear whether such a bomb existed. See EVANS & MORGAN, *supra* note 118, at 44 n.58. Maître Teitgen’s resolve was based on the proposition that “if you once get into the torture business, you’re lost. . . . All our so-called civilization is covered with varnish.” RITA MARAN, *TORTURE, THE ROLE OF IDEOLOGY IN THE FRENCH-ALGERIAN WAR* 117-118 (1989).

The argument of General Albano Jorge Harguindeguy in defense of the brutal and indiscriminate torture of leftists and suspected subversives in Argentina provides an illustration of the way in which the “ticking bomb” justification can quickly descend into barbarism:

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

GRAZIANO, *supra* note 4, at 28.

126. The classic cite is Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT’L J. CRIMINOLOGY & PENOLOGY 69 (1973), available at <http://www.prisonexp.org/pdf/ijcp1973.pdf>. See, e.g., Schlesinger Report, *supra* note 36, at 114-121 (DANNER at 394-399); CHRIS MACKAY, *THE INTERROGATORS* 471 (2004) (commenting on the “gravitational laws that govern human behavior when one group of people is given complete control over another in prison. Every impulse tugs downward.”).

referred to in the aftermath of the Battle of Algiers as the “mortal temptation of instantaneous efficacy.”<sup>127</sup> The job of interrogators is to get information, and any method that holds out the hope of achieving that goal quickly and decisively is far more attractive than an alternative that relies on slower psychological manipulation or careful cross examination. When the instantly effective mechanism involves the possibility of inflicting hardship on those who may be in league with terrorists who have attacked innocent Americans, the prospect of abuse becomes more attractive still.<sup>128</sup>

If torture and its cognates are permitted against sufficiently “high value” targets, it becomes increasingly difficult under pressure for officials to refrain from deploying those techniques. Those who incline toward abuse will be encouraged, should they believe the occasion warrants it; those who seek to resist abuse will lose moral stature. Some officials will tend to view their legally permitted scope of action as the starting point from which to push the envelope in pursuit of their appointed task. The wider the scope of legally permitted action, the wider the resulting expansion of extralegal physical pressure.<sup>129</sup> If torture becomes an officially recognized possibility, a functionary must be prepared to justify not applying torture. Torture will be an ever-present option, and there will often be no immediate psychological cost to exercising that option, for officials will be able to transfer the moral responsibility for the torture to higher officials.<sup>130</sup>

Under a clear policy of official prohibition, by contrast, the temptation to investigative excess is cabined by the bright line rule that physical abuse of prisoners is impermissible. Most officials will be inclined, by duty or by morality, to respect the minima of civilized behavior. As long as our law articulates a norm that says officials have an obligation to act decently, even

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127. MARAN, *supra* note 125, at 117.

128. See MACKEY, *supra* note 126, at 175 (“Most of the interrogators truly detested the prisoners they faced . . . and saw them as complicit in the September 11 attacks. Down deep most of us . . . saw our jobs as an opportunity to exact a small measure of revenge.”); cf. Dominique de Quervain et al., *The Neural Basis of Altruistic Punishment*, 305 SCIENCE 1254 (2004) (describing an experiment in which PET scans of the brains of subjects who punished violators of social norms of fairness revealed activity in the area of the brain activated by the pleasures of nicotine and cocaine).

129. See, e.g., EVANS & MORGAN, *supra* note 118, at 55 (quoting “the law of inevitable increment – whatever powers the police have they will exceed by a given margin”).

130. This is particularly true if the choice is to seek approval by a judge by way of warrant. Armed with a doctrine that requires them to “balance” the rights of suspects against the needs of the public, it seems entirely plausible to predict that warrants would issue in cases far short of the “ticking bomb,” for each warrant granted would be the starting point for an argument that a subsequent warrant should be granted in circumstances just a little bit short of the exigencies of the prior case.

when confronting terror, the official inclined to act with basic decency but confronted with occupational temptation has a basis to claim that her inclination to humanity does not cause her to abandon her duty but rather to fulfill it.<sup>131</sup> Thus, for example, the pseudonymous interrogator "Chris Mackey" reports that in Afghanistan his allegiance to the Geneva Conventions, whose spirit he understood to govern his conduct, allowed him to set limits to the abuse of prisoners in interrogation in the face of demands of Army Rangers.<sup>132</sup> And in Iraq, Sergeant Frank "Greg" Ford, a counterintelligence agent in the California National Guard's 223rd Military Intelligence Battalion, was driven to challenge "full bodied" torture of prisoners by a belief that "[t]here were . . . rules and regulations to follow. . . . You broke the rules, you paid the price. Period. Everyone knew that simple fact, and everyone accepted it."<sup>133</sup>

In response to pressure from peers or superiors to abuse prisoners, a conscientious official under a regime of legitimized torture can rely on no such inflexible norm of civilized behavior. "That's not a high enough value detainee" is hardly as powerful a retort to an accusation of being a moral weakling in the squadroom or midnight safe-house as "we don't violate the Geneva Convention" or "we are not Nazis."<sup>134</sup> The temptation to partake of the righteous joy of "altruistic punishment" cannot be balanced by mere proceduralism or subtle distinctions. If the prohibition is to be robust, it must be categorized as a threat to the identity of righteousness. Under a rule of official prohibition rooted in national identity, a functionary who declines to abuse a suspect can defend her actions by announcing that she is following the law.

To the extent that we know about the now-admitted abuses perpetrated in the current "global war on terror," it is because of a series of officials who

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131. See Kreimer, *supra* note 62, at 504-505.

132. MACKAY, *supra* note 126, at 271-289 ("I never wavered in my commitment to the Conventions"; limiting sleep deprivation of prisoners to the same sleeping patterns undergone by interrogators); see also *id.* at 31-32 (describing training in the constraints of the Geneva Conventions). Once one participant resists, the tendency of others to fall unthinkingly into abuse is weakened. See STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 118 (1974) (finding that resistance to demands to administer electric shock rose sharply when the subject observed others resisting); see also *id.* at 105-107 (conflicting authority severely undermines compliant actions).

133. David DeBatto, *Whitewashing Torture*, SALON, Dec. 8, 2004, at [http://www.salon.com/news/feature/2004/12/08/coverup/index\\_np.html](http://www.salon.com/news/feature/2004/12/08/coverup/index_np.html). By his report, Sgt. Ford was rewarded for his efforts to challenge torture by forcible removal from Iraq and an unsuccessful effort to have him declared insane.

134. MARAN, *supra* note 125, at 117 (argument of Bolladiere), 114 (order of Bolladiere to troops to reject "temptation which totalitarian countries have not resisted").

have stood up for humanity. Specialist Joseph Darby, outraged by his discovery of photographs depicting the abuse at Abu Ghraib, was impelled to bring the matter to investigation because “[i]t violated everything I personally believed in and everything I was taught about the rules of war.”<sup>135</sup> Master at Arms William Kimbro, a “dog handler,” as recounted by the dry prose of the Taguba Report, “knew his duties and refused to participate in improper interrogation despite significant pressure.”<sup>136</sup> General Anthony Taguba put his career at risk by actively investigating and accounting for the abuse at Abu Ghraib.<sup>137</sup> Members of the JAG Corps resisted the effort to dilute protections for prisoners, and ultimately they revealed that dilution to the human rights bar.<sup>138</sup> They, and others who courageously resisted temptations or pressure to traduce common decency, have been strengthened in their resolve by the conviction that the law stands on the side of humanity. Pettifoggery that seeks to distinguish between “torture” and “torture lite” saps that strength and dishonors their courage.

But what, it will be asked, of the victims of terrorist attacks who may die as a result of the excessively tender consciences of those entrusted with our security? My reaction is ultimately a profound skepticism that there will be such victims. In almost every interrogation, humanity and security can be aligned; torture and “torture lite” are often tempting, gratifying, but counterproductive shortcuts. Apparently, most of the abuse documented at Guantánamo and Abu Ghraib elicited quite quotidian and marginal information, and did not involve the direct prevention of catastrophe; indeed, FBI observers viewed the pattern of abuse as counterproductive. But should there come a time where an official is truly pressed to the wall and faces a real

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135. Josh White, *Soldier Who Reported Abuse Testifies, “It Was a Hard Call,”* WASH. POST, Aug. 7, 2004, at A5; Taguba Report, *supra* note 34, at 50 (DANNER at 325); HERSH, *supra* note 16, at 25 (Darby “felt very bad about it and thought it was very wrong.”); Kate Zernike, *Only a Few Spoke Up on Abuse as Many Soldiers Stayed Silent*, N.Y. TIMES, May 22, 2004; *see also* HERSH, *supra*, at 42-43 (describing other officers who filed official complaints of prisoner abuse).

136. Taguba Report, *supra* note 34, at 50 (DANNER at 325).

137. HERSH, *supra* note 16, at 43 (quoting a retired general as commenting, “He’s the guy who blew the whistle, and the Army will pay the price for his integrity. The leadership does not like to have people make bad news public.”); *see also* the objections by FBI and DIA personnel, *supra* notes 36-37. The two-page “Info Memo” of the DIA director, Vice Adm. Lowell Jacoby, is the most significant, because he is the highest-ranking official now known to have complained about prisoner mistreatment. Jacoby Memo, *supra* note 37.

138. *See* HERSH, *supra* note 16, at 66 (describing “two surprise visits” by senior military officers from the JAG Corps to Scott Horton, who was chairman of the Committee on International Human Rights of the Association of the Bar of the City of New York. “They wanted us to challenge the Bush Administration about its standards for detentions and interrogation,” said Horton.).

and immediate choice between vast devastation and inhumane brutality, my estimate is that the official will find the strength to take conscientious action, notwithstanding the possibility of legal condemnation. That decision would not be an easy one, nor should it be. Acceptance of the possibility of civil disobedience is no warrant to abandon the rule of law.<sup>139</sup>

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139. Cf. Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1009 (2000) (arguing that acknowledging the moral fault of a tragic decision “keeps the mind of the chooser firmly on the fact that his action is an immoral action, which it is always wrong to choose. The recognition that one has ‘dirty hands’ is not just self-indulgence: it has significance for future actions.”); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1099 (2003) (“When great calamities (real or perceived) occur, governmental actors tend to do whatever is necessary to neutralize the threat. Yet . . . it is extremely dangerous to provide for such eventualities within the framework of the legal system . . . because of the large risks of contaminating and manipulating that system, and the deleterious message involved in legalizing such actions.”).

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