TORTURE ASIAN AND GLOBAL PERSPECTIVES

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TRUMP IN POWER

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back cover photo:
A local fisherman is fishing at the Inle Lake also known as Inle Sap, a freshwater lake located in the Nyaungshwe Township of Taunggyi District of Shan State, part of Shan Hills in Myanmar (Burma). Photograph by Amila Sampath ©
One of the flaws with the ticking time bomb argument is that it assumes the authorities know just how much time is left, when the bomb will go off. In real situations, this is unknown.
Torture under the Bush administration. Although of it animate everything from serious philosophical discussions to television and film to the CIA’s justifications for its programme of interrogation torture under the Bush administration. Although its utility for justifying the institutionalisation and legalisation of interrogational torture has been found wanting, there may very well be one very useful, if ironic, application: to President Trump himself. Not unlike his ‘true’ stance and intentions on a range of other policy matters, the future of torture under the Trump administration is as uncertain—and as fraught as trying to find that ticking bomb.

Bringing back torture was, of course, part of Trump’s war-crimes-as-campaign platform, along with intentionally targeting non-combatant civilian members of ISIS fighters and taking Iraqi oil. Multiple times throughout the campaign he promised to bring back not just waterboarding and other CIA torture techniques, but “a hell of a lot worse.” He has offered, at various points, three rationales for doing so: it works, they deserve it anyway for what they’re doing, and, more recently, a plebiscitary justification that he would do it if the American people want it.

All three are deeply problematic. With respect to effectiveness, abundant empirical evidence, systematic exploration of the logic of torture, and the Senate’s investigation into the CIA program all point to torture’s ineffectiveness in generating reliable, actionable threat information. Torture as punishment or revenge is a non-starter even for Bush administration torture proponents such as Dick Cheney and other conservatives such as former Supreme Court Justice Antonin Scalia, all of whom have insisted that torture (not their term) was for information only, that revenge better be very, very sweet because we will be sacrificing innocent lives to taste it. Finally, it is difficult to know what to make of the plebiscitary justification. Normally one might dismiss such a statement as metaphorical or a purely rhetorical nod to democratic representation. But little is normal with Trump. If there is one thing consistent about him, it is his obsession with ratings, with numbers, as the inauguration crowd pettyness made all too clear. A narcissist who craves public expressions of popular adulation, it is actually conceivable Trump would consider torture by Twitter vote.

Trump does appear to be trying to make good on his campaign promise. Not even a week into his presidency and amid a flurry of other executive orders, the New York Times released a draft executive order that revokes Obama’s executive orders halting the CIA torture programme and instructs intelligence officials to review interrogation techniques and policies to see whether the system of secret CIA prisons and interrogations should be revived. After news of it leaked, Trump stated that he would go with whatever Defense Secretary Mattis and CIA Director Mike Pompeo advised, but that he was convinced that it worked and was justified.

And yet, there is hope. Both legal and political constraints reduce to some extent the likelihood torture will be revived soon. Neither is a guarantee and both depend on others in government and Congress to be willing to stand up to Trump if it came to that, but they do present real obstacles.

The primary legal constraint is section 1045 of the 2016 National Defense Authorization Act, the annual defense appropriations bill signed by then President Obama in 2015. This amendment essentially copied and pasted into the NDAA Obama’s executive order ending the CIA program and limiting interrogation techniques to those in the Army Field manual. Thus, waterboarding and the other CIA torture techniques are now prohibited by law and cannot be overridden by executive order.

Any attempt to change the law is likely to face additional legal hurdles. First, simply repealing the law and returning to the vaticos quo ante under Bush is unlikely to be sufficient at this point. Bush administration Justice Department lawyers John Yoo and Jay Bybee twisted the law in now infamous “torture memos” in order to square the administration’s desire to use torture with the federal law forbidding it. Those arguments rested on two pillars connected to the definition of torture, since discredited.

The first denied that CIA torturers would meet the standard of “specific intent” required by the torture statute since their ultimate objective was to obtain intelligence and not to cause pain and suffering. However, this Orwellian reading conflicts both with the interpretations of the “specific intent” standard in US “statutory text, legislative history, and jurisprudence” on the one hand, and the jurisprudence of The Commission on Torture and international courts on the other. All have found that the intent requirement is satisfied when pain or suffering is intentionally inflicted for a prohibited purpose. The Convention Against Torture, codified into US law in the torture statute, specifically identifies one of these prohibited purposes: “information.” Nor can the prohibition be overridden, for article two states that “No exceptional

1 For thoughtful philosophical explorations of the ticking-bomb argument, see Fritz Allhoff, Terrorism, Ticking Time-Bomb, and Torture (Chicago: University of Chicago Press, 2012) and Uwe Steinheilh, On the Ethics of Torture (Albany, NY: State University of New York Press, 2013). For dozens of quotes of CIA officials to their Congress see the Study of the Central Intelligence Agency’s Detention and Interrogation Program (Senate Torture Report), pp.198-200, footnotes 1,050 and 1,051; pp.321-322, footnote 1,667, and section III, passim.


circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

In short, given the current state of legal scholarship, it is hard to see this argument going very far.

The second argument denied that the CIA torture methods met the standard of “severe physical or mental pain and suffering” in the statute. The CIA techniques did not qualify as severe physical pain or suffering because they were not equivalent to “death, organ failure, or serious impairment of body functions.”

Nor, according to the memo, did the CIA methods result in “the prolonged mental harm” caused by severe mental pain or suffering. Although information was available at the time of the memo’s drafting that showed such methods did indeed cause both physical and mental harm sufficient to meet even the CIA’s standard, the publicity surrounding the CIA programme has resulted in even more evidence that the CIA techniques constituted torture even according to that (high) threshold.

The neuroscientist Sean O’Mara has, in a series of papers and a book, shown that the CIA techniques are not only “psychological” torture. The stress of the techniques imposed by the CIA actually damages the most important organ in the human body: the brain.

More precisely, neural saturation by stress hormones like cortisol due to prolonged stress results in hypotrophy and/or cytohypertrophy in the prefrontal cortex and hippocampus and hypertrophy in the amygdala. This, via the brain’s inevitable automatic, and uncontrollable stress response, torture causes actual tissue loss and abnormal tissue growth, impairing brain functioning.

The psychological consequences of such brain damage are well known, including PTSD symptoms. Moreover, they have been shown not just in the general neuroscience and biomedical literature, but are observed in former CIA detainees. The New York Times published a series of articles in the autumn of 2016 documenting the physical and mental harm that these detainees have experienced as a result of their torture in secret CIA prisons.

Psychological effects include difficulties focusing, memory problems, fear, anxiety, depression, paranoia, withdrawal, headaches, flashbacks, sudden anger, psychosis, panic attacks, mood fluctuation and compulsive eating. Some have the full panoply of PTSD symptoms. A lawsuit working its way through the courts has resulted in more revelations of the details of CIA torture from the perspective of both the torturing and the tortured.

The upshot of all this is that it will be much more difficult to argue in 2017 than it was in 2002 that the CIA’s methods do not meet the physical and mental pain and suffering standard.

Of course, another Trump option would be to seek repeal of not just the NDAA provision, but also the torture statute itself. If that were to happen, the United States would be in violation of Article four of the convention, which requires that that signatories make acts of torture offenses under their criminal laws with appropriate punishments. This would not mean, however, that the US will have formally withdrawn from the convention and it would still be bound by its terms. A formal withdrawal from the treaty requires notifying the UN Secretary General in writing.

The political shock of joining the ranks of Iran, North Korea, Oman, Myanmar, Zimbabwe, and kindred regimes makes this step unlikely, even under a Trump administration that is throwing multilateralism out the window. Indeed, there are significant political obstacles to reviving torture. First, as has been widely reported, Trump’s Secretary of Defense, retired General James Mattis, his CIA Director Mike Pompeo, his Attorney General Jeff Sessions, and his Homeland Security Secretary retired General Mike Kelly all opposed torture at their confirmation hearings. It is true that Pompeo seemed to leave the door open to considering other interrogation techniques in his written statements to the Senate Intelligence Committee and Trump’s rabidly anti-Islamic national security advisor, retired Gen. Michael T. Flynn, has refused to rule out the techniques. Nevertheless, Mattis has a particularly strong track record of opposing torture and appears to be very influential with Trump. Second, the CIA itself has little interest in reviving a program for which it received so much criticism over the past decade. Finally, there is a sizeable group of Republicans in Congress, especially the Senate, who would join Democrats in blocking any attempt to legislate torture.

Of course, these are only obstacles if cabinet officials push back, if the CIA refuses to carry out illegal orders, and members of Congress are willing to stand up and vote no. Remember that there were voices of opposition in the Bush administration who were drowned out. But suppose they do resist and the legal prohibition remains in force. What might Trump do then? Given his ignorance of the law, his general disregard for democratic and constitutional norms and his overweening confidence in his own judgment and abilities, it is worrisome to contemplate what extra-legal actions he might take.

One of the laws with the ticking time bomb argument is that it assumes the authorities know just how much time is left, when the bomb will go off. In real situations, this is unknown. The same is true for a revival of torture under Trump. He could go off anytime.
Once the authoritarian side of political governance takes hold, it is hard to eradicate. Power is addictive, especially when it is reckless, and offers personal rewards for those politicians who follow the corporate script and stand to benefit from human misery.
One measure of a failed state is its attitude towards torture. State sponsored torture suggest not only a flight from any sense of moral and social responsibility, it also reveals a politics that has been transformed into pathology and a culture that legitimates violence and cruelty. The United States is addicted to torture. Not only does this savage addiction run through its history like an overheated electric current, but it has become intensified as part of a broader national psychosis of fear, war, and violence. A post-9/11 obsession with security and revenge has buttressed a war culture in which violence becomes the first principle, an essential need, whether in the guise of a national sport, mode of entertainment, or celebrated ideal. The deadly matrix of fear and militarisation has produced in the United State an increasing reliance on the punishing state to solve social problems. One consequence is a hardening of the culture and a political drift towards liberal authoritarianism in which violence now mediates everyday relations and America’s connection to the larger world.

As such, terror, fear, war and torture become normalised, and the work of dehumanisation takes its toll on the American public, more and more people become not only numb to the horror of torture but begin to live in a state of moral stupor, a state of moral and social responsibility, it also reveals a connection to the larger world.

The deadly matrix of fear and militarisation has produced in the United State an increasing reliance on the punishing state to solve social problems. One consequence is a hardening of the culture and a political drift towards liberal authoritarianism in which violence now mediates everyday relations and America’s connection to the larger world.

Torture for the United States is also part of a long history of domestic terrorism, as was evident in the attempts on the part of the FBI, working under a secret program called COINTELPRO, to assassinate those considered domestic and foreign enemies. COINTELPRO was about more than spying; it was a legally sanctioned machinery of violence and assassination. In one of the most notorious cases, the FBI worked with the Chicago Police to set up the scene for the assassination of Fred Hampton and Mark Clark, two members of the Black Panther Party. Noam Chomsky has compared COINTELPRO, which suggests that in a market-driven society with its unchecked individualism, sheer social Darwinism and refusal to think about social costs – or, for that matter, any notion of the public good – an addiction to cruelty, violence and torture becomes only too easy. In the age of disposability and despissable gaps in wealth, income and power, modern terror becomes normalised and points to the onslaught of a mode of totalitarianism that is more than an ephemeral moment in history. Violence is no longer marginal to American life; it is the foundation that now drives it.

With the election of Donald Trump to the presidency, it became clear that the United States has once again entered into a new and barbarous stage in its history, one in which acts of violence and moral depravity are not only embraced but celebrated. Certainly, this is not to suggest that the United States had not engaged in criminal and lawless acts historically or committed acts of brutality that would rightly be labelled acts of torture. That much about our history is clear: indiscriminate violence and torture practised through and with the right-wing Latin American dictatorships in Argentina, Chile, Uruguay, Paraguay, Bolivia and Brazil in the 1970s; the willful murder and torture of civilians in Vietnam, Iraq, and Afghanistan; and, of more recent memory, the torture and prisoner abuse at Guantánamo and Abu Ghraib. The United States is no stranger to torture, nor is it free of complicity in aiding other countries notorious for their abuses of human rights. As Noam Chomsky and Edward Herman have reminded us: among “35 countries using torture on an administrative basis in the late 1970s, 26 were clients of the United States.”

Torture has also had a long-standing domestic presence as part of the brutalised practices that have shaped American chattel slavery through to its most recent “peculiar institution,” the rapidly expanding prison-industrial complex. The racial disparities in American prisons and criminal justice system register the profound injustice of racial discrimination as well as a sordid expression of racist violence. As the novelist Ishmael Reed contends, this is a prison system “that is rotten to the core … where torture and rape are regular occurrences and where in some states the conditions are worse than at Gitmo. California prison hospitals are so bad that they have been declared unconstitutional and a form of torture.”

The United States was condemned around the globe for its support of torture under the Bush/Cheney administration and it was hoped that such extensive condemnation would take place when President Obama came to office. Fortunately, he outlawed the most egregious acts practised by the Bush-Cheney torture regime, but refused to prosecute those CIA and other government officials

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5 1 for an excellent source, see Ward Churchill and Jim Vander Wall, The COINTELPRO Papers: Documents from the FBI’s Secret Wars Against Dissent in the United States (Boston: South End Press, 2001). Also see The People’s History of the CIA website http://www.thepopleshistory.net/2013/07/cointelpro-this-war-on-us-citizens.html.

6 Noam Chomsky quoted in Goodman, “From COINTELPRO to Snowden.”


engaged in such barbarous acts, including torture, rendition, illegal assassinations and other duly constituted war crimes. President Trump has pledged to reverse the refusal on the part of the United States to use torture and in doing so has presented a case to the public for illegal legalities, moral depravity and mad violence wrapped in a whitewashed logic of such subterfuge that it rivals Orwellian doublespeak. The rhetorical gymnastics used by the newly emboldened torture squad are designed to make the American public believe that not only is torture the best way to prevent a terrorist attack but that it is completely defensible politically and morally. The latter represents not just the discourse of magical thinking, but a refusal to recognise that “if cruelty is the worst thing that humans do to each other, torture is the most extreme expression of cruelty.” The newly apostles of torture such as Trump and his coterie of morally depraved politicians such as Steve Bannon thrive in some sick zone of political and social abandonment, and unapologetically further acts of barbarism, fear, willful lies, and moral depravity. They are the new totalitarian who hate democracy, embrace a punishing state and believe that politics is primarily an extension of war. They are the thoughtless gangsters reminiscent of the monsters who made fascism possible at another time in history. For them, torture is an instrument of fear; one sordid strategy and element in a global war that attempts to expand U.S. power and put into play a vast legal and repressive apparatus that expands the field of violence and the technologies, knowledge, and institutions central to fighting what they wish to be an all-encompassing war on terror. Americans now live under a government in which the doctrine of permanent warfare is legitimated through a state of emergency deeply rooted in a mass psychology of violence and culture of cruelty that are essential to transforming a government of laws into a regime of lawlessness.

Once the authoritarian side of political governance takes hold, it is hard to eradicate. Power is addictive, especially when it is reckless, and offers personal rewards for those politicians who follow the corporate script and stand to benefit from human misery. Ignoring that torture is an exercise of power based on willed amorality, they employ the morally bankrupt discourse of security and rely on propagating a culture of fear in order to exist in a liminal space free of criticism and moral outrage.

Civility has not been the strong point of a Republican Party that is overtly racist, hates immigrants, bans Muslims from seven countries and twists logic in order to claim itself a victim of hate, all the while catering to every whim of the financial elite. Through its vast army of talking heads and anti-public intellectuals coupled with a supine press, the United States doesn’t just alienate its enemies, it actively creates them by spreading hatred and lies. Principles are not being defended in these arguments—only the kind of raw, naked power that has come to mark authoritarian regimes. It gets worse. The defenders of the globalised torture state are neither deranged nor even confused; on the contrary, they are decisive and deliberate in their allegiance to capital and the corporate machinery of social, cultural and political violence that will provide them with lucrative jobs once they finish the bidding of defence contractors and other proponents of the finance and warfare state.

Not only has the United States lost its moral compass, it has degenerated into a state of political darkness reminiscent of dictatorships that maimed human bodies and inflicted unspeakable acts of violence on the innocent while embracing a mad utilitarianism in order to remove themselves from any sense of justice, compassion and reason. This is the formative culture not simply of a society that is dehumanising and ethically lost, but one that produces a society in alignment with the savage ethos and beliefs of an updated totalitarianism. Thus far, little has been said about either the conditions that made this long journey to the dark side possible, or what moral, political, and educational absences had to occur in the collective psyche of both the American public and the U.S. government that not only allowed torture to cloud its history but actually sanctioned its use. What made it so easy for the barbarians to not only implement acts of torture but to openly defend such practices as legitimate government policy? And how is it possible that after the egregious suffering imposed on many innocent people by the Bush/Cheny regime, the United States government under President Trump is once again legitimating state-sponsored torture?

Under President Trump, the possibility of a politically and morally charged critique of torture has turned into a cowardly and evasive debate around questions such as: Does torture prevent terrorist acts from taking place? Is waterboarding really an act of torture? Is torture justified in the face of extremist attacks on the United States? These are the wrong questions and reveal the toxic complicity the mainstream press has had all along with these anti-democratic practices. War crimes should not be debated; they should be condemned without qualification.

There is more than a hint of moral depravity here; there is also what I have called elsewhere the violence of organised forgetting.10 Discussions of torture should never involve a cowardly appeal to balance. The only reasonable approach any democracy can take towards torture is both to condemn it and to prosecute those responsible for it as well as those who practice it. In this case, it is political reasonable and morally correct to argue that President Trump in supporting state sponsored torture has legitimated a war crime and as such should be open to prosecution.

For a society to regard torture as a reasonable practice worthy of informed debate reveals a death-dealing virus deeply embedded in the American social and political psyche, partly produced by those commanding cultural apparatuses that believe the only value that matters is rooted in acts of commerce and the accumulation of capital at any cost—and that willingly glean massive profits from the carcinogetic culture of the mainstream media that sell pervasive spectacles of violence and the unchecked militarism of American society as entertainment. Ideas matter, education matters, morality matters and justice matters in a democracy. People who hold power in America should be held accountable for what actions they take and what actions they permit, especially when they violate any and every standard of human rights and decency.

Is it unreasonable to argue that the lawlessness that creates the torture state also extends the tentacles of the globalised torture state? Is it too far-fetched to argue that the United States’s past history of torture and it current willingness to engage in torture has become symptomatic of something much larger than an errant plunge into immorality and lawlessness? What begins to be revealed is a more systemic entrenchment in what Robert Jay Lifton has described as “a death-saturated age”11 in which matters of violence, survival, and trauma inescapably bear down on daily experience while pushing the United States

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American Allies Need to Actively Oppose Trump’s Torture Policy

With President Trump we are in somewhat uncharted waters. Never has there been an American president who has been so forcefully pro-torture in the modern era. The domestic environment in which he will make this decision is also dangerously supportive of his views.
Throughout the 2016 presidential campaign, President Donald Trump openly supported the use of torture. At the beginning of the campaign, he argued that torture works, but even “if it doesn’t work, they deserve it anyway for what they do to us.” Later in the summer, he claimed that “I would bring back waterboarding, and I’d bring back a hell of a lot worse than waterboarding. We’re like a bunch of babies, but we’re going to stay within the laws. But you know what we’re going to do? We’re going to have those laws broadened. They say, what do you think about waterboarding? I said I like it a lot. I don’t think it’s tough enough. You have to fight fire with fire.”

Trump has not changed his position since becoming president. When his Defense Secretary, General James M. Mattis, surprised him by arguing, “give me a pack of cigarettes and a couple of beers and I do better with that than I do with torture,” Trump explained, “I’m not saying it changed my mind. Look we have people that are chopping off heads and drowning people in steel cages and we’re not allowed to waterboard.” Vice President Mike Pence kept the option open in a subsequent interview responding to criticism over the use of torture. “I don’t think it’s tough enough. You have to fight fire with fire.”

The domestic conditions for President Trump to reinstate torture are quite permissive, particularly when set against the high international legal standard of “no exceptional circumstances whatsoever.” First, torture has become acceptable among the American public. An ICRC poll in December 2016 showed that 46% of Americans believed that torture could be used on an enemy combatant, with 30% opposing. Likewise, in a March 2016 poll, 63% of Americans claimed that torture is often or sometimes justified, and only 15% claimed that it is never justified — even though this is the prevailing legal position in international law.

This is not a short-term phenomenon. Americans have consistently supported the use of torture in public opinion polls throughout Obama’s presidency. In fact, we can trace a steady increase in American’s support for torture, starting after the torture scandals of Abu Ghraib and the revelations of torture at CIA black sites in 2005 and 2006. As things stand, it is unlikely that President Trump will face serious consequences electorally should he decide to put torture back on the table.

Despite this grim outlook, a return to torture under the Trump administration is not a fait accompli. President Trump, like all politicians, faces political pressures that can either help or hinder him in going from idea to action. However, given the current political conditions domestically, it is particularly important that allies of the United States make it clear that the use of torture is not only unacceptable, but that it will damage the interests of the United States by putting intelligence- and military-cooperation at risk.

Permissive Domestic Conditions

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Importance of the American Allies

Given the relative permissive conditions domestically, it is therefore important that American allies play an active role in dissuading Trump from reinstating torture. The international community has certainly taken on this mantle before. In my own research, I found that many states were openly opposed to Bush’s use of torture and grew increasingly so between 2001 and 2008. This made cooperative efforts difficult. The CIA black site program, for instance, could only operate through constant diplomatic effort on the part of the United States and the transfer of large sums of money to black site hosting states. Even when the program was secret, cooperation was unstable. Once it came to light in 2006, the CIA found it almost impossible to maintain existing partners.

Unlike the Bush administration, Trump openly uses the word ‘torture,’ which is unambiguously in violation of the laws of armed conflict and international human rights law. There is thus an important role for US allies to be clear about their disapproval and to make the international diplomatic costs of using torture clear. But the way in which they should do this is not straightforward.

One of the big questions of the Trump administration is whether traditional name-and-shame techniques used by human rights NGOs, international organisations and foreign governments will have the same effect in a political environment where communitarian populism is much more pronounced. Openly criticising Trump for his torture policy, whether promoted or actually enacted, could lead to a rally-around-the-flag effect among his supporters, who are already primed for a president that will make the tough decisions and put America’s interests ahead of what foreign governments might want. If this is the case then a direct confrontation approach might not be as successful as it has been in the past.

Given this, there is an argument to be made that American allies need to be subtle but persistent over in their interactions with the Trump administration over torture. Statements such as those made by Angela Merkel, which reinforced cooperation based on “the dignity of each and every person,” combined with sustained closed door lobbying to emphasise the costs of lost cooperation, might be more important than open declarations of opposition to Trump’s plans. This is particularly the case since there is much to lose: the United States and their allies are partners in many military and intelligence-gathering operations, all of which would be at risk if Trump decides reinstates torture. Theresa May’s recent comments, which reinforced the UK position to not share intelligence with states practicing torture, is an example of what all American allies can do to make these costs clear.

Conclusion

With President Trump we are in somewhat uncharted waters. Never has there been an American president who has been so forcefully pro-torture in the modern era. The domestic environment in which he will make this decision is also dangerously supportive of his views. This suggests a clear role for American allies to be clear about their disapproval and to make the international diplomatic costs of using torture clear. But the way in which they should do this is not straightforward.
allies to help tip the scales against torture by putting pressure on the United States. However, the way in which this should be done is not as clear. It is very possible that the nature of Trump’s communitarian populist movement is such that open opposition to Trump and his policy might be less productive that it has been in the past. If this is the case, an approach that emphasises the benefits of cooperation contingent on torture being taken off the table might be the best strategy to keep Trump’s ideas from being turned into policy.

into the dark recesses of a new authoritarianism. Trump’s recent pronouncement that the United States government will use torture suggests that radical evil and an upsurge of lawlessness have once again taken hold in the United States. This is the ideological metrics of political zombies. A radical democracy demands a notion of educated hope capable of energising a generation of young people and others who connect the torture state to the violence and criminality of an economic system that celebrates its own depravities. It demands a social movement unwilling to abide by technological fixes or cheap reforms. It demands a new politics for which the word revolution means going to the root of the problem and addressing it non-violently with dignity, civic courage and the refusal to accept a future that mimics the present. Torture is not just a matter of policy, it is a deadening mindset, a point of identification, a form of moral paralysis, a war crime, an element of the spectacle of violence and it must be challenged in all of its dreadful registers.

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is an Assistant Professor in International Relations at the Center for War Studies, University of Southern Denmark. He has previously written on the international reaction to the Bush administration’s torture program in the American Journal of Political Science and the British Journal of Politics and International Relations. His book, US Human Rights Conduct and International Legitimacy, traces how the Bush administration unsuccessfully challenged human rights international norms surrounding torture, habeas corpus and rendition.

Henry Armand Giroux
received his Doctorate from Carnegie-Mellon in 1977. He then became professor of education at Boston University from 1977 to 1983. In 1983 he became professor of education and renowned scholar in residence at Miami University in Oxford, Ohio where he also served as Director at the Center for Education and Cultural Studies. He moved to Penn State University where he took up the Waterbury Chair Professorship at Penn State University from 1992 to May 2004. He also served as the Director of the Waterbury Forum in Education and Cultural Studies. He moved to McMaster University in May 2004, where he currently holds the McMaster University Chair for Scholarship in the Public Interest.
Countess Elizabeth Bathory, alias Blood Countess (1560–1614), was a member of the Bathory family, who ruled Transylvania. Notwithstanding the fact that the boundaries between history and mythology are often blurred and fluid, Countess Bathory will be remembered as perhaps the most sadistic female serial killer in all recorded history.1 What has captured the imagination of both historians and artists is the fact that she found pleasure in torturing and killing young girls. Bathory’s torture repertoire included stabbing victims, cutting them with scissors and burning them with red-hot metal items.

At the same time when Countess Bathory used to drink the blood of young girls in order to preserve her youthfulness, the criminal justice system in her youthfulness, the criminal justice system in Continental criminal procedure, although contemporary scholars were well aware of the moral status of torture belief in its probative value nipped every criticism in the bud. Notwithstanding the fact that torture has been used for thousands of years it was an ‘offspring of religion’, i.e. the criminal justice process, that systematically instrumentalised and developed interrogation methods in order to extract a confession. Policy considerations and the need to punish the guilty trumped any argument about their moral or legal status. The phrase ‘torture works’ can easily encapsulate the zeitgeist of that time. Now the question is: Does it really work? Do interrogation techniques which cause severe pain or suffering, whether physical or mental (I am using here intentionally the wording of Art. 1 CAT), elicit accurate (truth-conducive) intelligence? If the answer is affirmative, then their effectiveness could place a fire-wall around them, immobilising them from criticism, at least on a political level, and especially when it comes to a state which defies international law in the post-9/11 era when it deems it necessary to do so.

Cesare Beccaria (1738–1794), co-initiator of the Enlightenment and father of modern criminal law theory, provides us with a guide to the demythologisation of torture or its alleged effectiveness. Chapter 16 of Beccaria’s most influential treatise Dei delitti e delle penne (1764) offers an unparalleled criticism of contemporary legal thinking. In a fascinatingly modern and analytical (with hindsight we can even say; game-theoretical) way he models the procedural phenomenon of interrogation and explains how torture leaves the guilty better off. As for the innocent, Beccaria writes,

‘...either he confesses the crime which he has not committed, and is condemned, or he is acquitted, and has suffered a punishment he did not deserve. On the contrary, the person who is really guilty has the most favourable side of the question; for, if he supports the torture with firmness and resolution, he is acquitted, and has gained, having exchanged a greater punishment for a less.’

But this is by far not the biggest problem we encounter as regards torture. The real issue is, Beccaria shows, the diagnosticky of torture. Unless one is willing to use metaphysical arguments and suggest that God will empower the innocent to endure the interrogation we conclude, Beccaria suggests, that pain cannot be ‘the test of truth’. Employing torture culminates in using a method that interferes with the object of inquiry. It is not the actual events of the alleged crime that are unravelled before the eyes of the investigator but the strength ‘of the will of the accused’. For the method of proof ‘will compel the sufferer to use the shortest method of freeing himself from torment’. As a CIA operative puts it: ‘We had people who were willing to confess to anything if the [South Vietnamese] would just stop torturing them’.2

Based on the (questionable) assumption that only ‘the guilty confess’, torture generates and maximises the number of confessions while making the criterion, which on its own terms helps us differentiate between guilty and innocent, dissolve. The ‘very means employed to distinguish the innocent from the guilty’ will, Beccaria explains, make the difference between them disappear, so that we receive information about ‘the force of the muscles and the sensibility of the nerves’ of the accused person rather than a truth-conducive statement. Torture? ‘C’est une affaire de tempérament!’, as Frederick the Great pithily announced. We face the problem with a man who uses a rod to find water. Although contemporary scholars were well aware of the problem with a man who uses a rod to find water. Although contemporary scholars were well aware of the problem with a man who uses a rod to find water. Although contemporary scholars were well aware of the problem with a man who uses a rod to find water.
the rod that led him there. The rod is not an indicator of water in the same way that a coerced confession is not an indicator of guilt.

Nowadays we have empirical evidence to back Beccaria’s proto-scientific analysis, namely that the level of coerciveness of the interrogation is proportionate to the probability of eliciting a false confession.8 Torture leads to the disclosure of information that is not reliable. The problem is not the truth-value of the propositional content of the confession — this could be either right or wrong — but rather the reliability of the interrogation process, on which the discovery of truth predicates. It is not irrelevant that the Army Field Manual explains that strategically useful information is best obtained from prisoners who are treated humanely, and that information obtained through torture has produced faulty intelligence.9

Advocates of torture have to acknowledge that legal adjudication, indeed every epistemic inquiry, is a normatively structured reasoning under uncertainty.10 As the epistemologist Michael Williams puts it, ‘lacking a hot line to Nature’s mysteries we make decision based on their epistemic virtues’.11 Drawing factual conclusions that fit well with the admissible evidence and the standard of proof, salient in the respective type of adjudication, is the way of rendering verdicts that can be regarded as true, not the other way round. In other words we measure truth by the ways we are epistemologically entitled to raise warranted knowledge claims, and not by its correspondence with some cognitively unapproachable ‘objective truth’.

A coerced confession is – from the point of view of epistemology – bad evidence.

Our emphasis on the element of uncertainty is of great significance for the simple reason that nearly all ticking-bomb scenarios follow a basic structure: The interrogator knows that there is a time-bomb hidden. He also knows for certain that the suspect is a terrorist who knows where the time-bomb is. Torturing him in order to extract intelligence will avert the impending massacre and save the lives of many thousands of people. The crucial element of this scenario is that the interrogator has privileged access to information, which normal fact-finders lack. This striking asymmetry has one purpose. It, as McKenna and Gerrity explain, portrays the torturer ‘as a principled, heroic figure’.12 However, this scenario is unrealistic. Although it provides an uncomplicated idea for the plot of a blockbuster, the ticking-bomb scenario excludes the element of uncertainty and thus becomes irrelevant in real life situations.

Torture is a clear violation of international law and does not work. However these insights do not mean we cannot remain alert to its abhorrent nature and potential use. We owe it to each other and to future generations to prevent another half-Millennium of torture based on lust, trust in some metaphysical concept such as a deity, or a misguided ‘war on terror’. Let us remind ourselves of Beccaria’s lesson.

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9 Ibid, p. 192.
11 Michael Williams, Problems of Knowledge, 2001, p. 239.
12 Costanzo and Gerrity, (note. 8), p. 200.
What does Camus propose? A rebellious heart that governs principled action. “The rebel undoubtedly demands a certain degree of freedom for himself; but in no case, if he is consistent, does he demand the right to destroy the existence and the freedom of others. He humiliates no one...He is not only the slave against the master, but also man against the world of master and slave.” Is this not a concise, persuasive anti-torture statement?
for accountability. I was one among many who thought the nightmare would go away on November 8, Election Day, who were up most of the night struggling with disbelief. What if we had held Colin Powell accountable for lying at the U.N.? What if we had prosecuted the Administration for leading the U.S. into an illegal invasion of a country which posed no present threat? But despite the efforts of dedicated human rights organisations, lawyers who represented detainees, authors who wrote against the torture programme and against the war, there was neither the public will nor interest to hold the torturers accountable. When President Obama announced we must look forward, not back—that though he would not sanction torture, he would also not investigate the crimes of the past, torture, in journalist Mark Danner’s words, became “a policy choice.”

Now we have an announced Islamophobe in the White House who proclaims, against all evidence, “that torture works”; who says the nation and the world are under threat, not from global warming which he calls “a hoax”, or nuclear weapons, but from “radical Islamic terrorism” which must be stamped out. When he starts a war (against Iran?) and uses “national security” to silence those who “question” or whose words, became “a policy choice.”

We make phone calls, sign petitions, we march by the millions, we rely, again, upon our principled actions, and the generosity of the man who understands the dangers of neither nuclear war nor climate change. We are all potential torture victims now. We watch and wait as the instruments of our misery are readied and engaged. We have nothing to confess but that we failed to secure our liberty and protect the earth on which we live, though some of us fought and continue to fight hard and long for just these things.

I have been reading Camus’ The Rebel, since just after the election. Camus, we remember, lived through the worst nightmares of the Twentieth Century in which Nazi Fascism and Soviet Totalitarianism (both of which began as revolutionary movements, to make things “great”) caused the murders of many, many millions, and gave eventual rise to the “new” fadting but no less dangerous for that – hegemony of the United States.

Camus does not promise success. The Rebel is not a hope-filled, revolutionary statement; Camus abhors the very notion of revolution. He offers, instead, a hope-filled, revolutionary statement; Camus abhors the thought throughout: to earth we owe allegiance, and destiny of all men. We shall choose Ithaca, the finite sanctity of earth, earth’s creatures and earth’s biosystem as determinants of our actions. “The rebel undoubtedly demands a certain degree of freedom for himself; but in no case, if he is consistent, does he demand the right to destroy the existence and the freedom of others. He humiliates no one... He is not only the slave against the master, but also man against the world of master and slave.” Is this not a concise, persuasive anti-torture statement?

Moreover, despite his ever-present use of the masculine pronoun, Camus’ book proves itself to be a profound environmentalist, earth-centered, therefore, ecofeminist work. In his insistence upon limits, Camus recognises our concern for the present as the key to securing the future and he acknowledges the finite sanctity of earth, earth’s creatures and earth’s biosystem as determinants of our actions. “The rebel thus rejects divinity in order to share in the struggles and destiny of all men. We shall choose Ithaca, the faithful land, frugal and audacious thought, lucid action, and the generosity of the man who understands. In the light, the earth remains our last love.” He reiterates the thought throughout: to earth we owe allegiance, earth’s needs set limits on our actions.

Much worse once the Trump Administration is fully in place. The Cabinet from hell, a collection of incompetents, racists, sexists, fossil fuel and other business moguls, Islamophobes and ignoramuses is in a slow, agonising process of confirmation, one by one, against wide-spread civil protest and principled opposition from most Senators in the minority and toothless Democratic Party. Some Cabinet nominees, like Betsy Devos, sister of Eric Prince, founder of the notorious private contracting torture outfit, Blackwater, have direct ties to profiting from torture. DeVos is now Secretary of Education with responsibility for overseeing the education of the millions, we rely, again, upon our principled action, and the generosity of the man who understands the dangers of neither nuclear war nor climate change.
TORTURE has torn through additional restraints since I first tried to get a grip on it (Shue 1978). Then I began by apologizing for raising an issue that I thought most Americans considered closed. The worst torturers seemed to be in such places as the Shah’s Iran, Marcos’s Philippines, South Korea and Latin American dictatorships, including Chile, Argentina, Brazil and Guatemala.1 Courageous US Congress members like Don Fraser of Minnesota and Vietnam war veteran Tom Harkin of Iowa led an outcry against torture in the early 1970s, a protest that provoked my own interest—and was later embraced by the presidency of Jimmy Carter after 1976. Many of us thought that “torture was practised in the Third World but condemned by Americans and Europeans, reminiscent of the author of the 1911 entry on “Torture” for the Encyclopaedia Britannica, who claimed “[t]he whole subject is now one of only historical interest as far as Europe is concerned” (Waldron 2005b: 1683-84; 2010: 187). How far, and how sadly, wrong can one be!

It emerged that a number of the Latin American torturers had been trained at Fort Benning, Georgia, in the School of the Americas in techniques developed by the Central Intelligence Agency (CIA) (Gill 2004; McCoy 2006: 60-107; Rejali 2007). Unknown to me and most other US citizens whose taxes were funding it in 1978, CIA had already for decades been funding a massive academic research programme designed to create a new paradigm of torture, which is now in operation and has to a considerable degree corrupted the US military (Wolfendale 2007, Forsythe 2011).

The most penetrating account of this secretly funded research is Wisconsin historian Alfred W. McCoy’s

1 Even then it was clear that the hands of the US Government were not entirely clean; for example, the Shah had been restored to power by CIA and was receiving massive US security assistance, as was the South Korean dictator viewed as a bulwark against North Korean communism.

A Question of Torture: CIA Interrogation, from the Cold war to the War on Terror: “From 1950 to 1962, the CIA became involved in torture through a massive mind-control effort, with psychological warfare and secret research into human consciousness that reached a cost of a billion dollars annually - a veritable Manhattan Project of the mind” (McCoy 2006: 7).

In April 1953 the CIA organized its various research grants “under the umbrella of a unified project, MKUltra”: (ibid.: 28). Much of the research on human consciousness involved human experimentation: “[f]rom 1953 to 1963, MKUltra and allied projects dispensed $25 million for human experiments by 185 nongovernmental researchers at eighty institutions, including forty-four universities and twelve hospitals” (ibid.: 29). Direct and indirect CIA contracts went to universities including, for instance, McGill, where pioneering research had been done by the great psychologist Donald O. Hebb (ibid.: 32); also Yale, with Irving L. Janis and Stanley Milgram (ibid.: 32-33); and Cornell Medical Center’s Lawrence Hinkle and Harold Wolff (ibid.: 41, 45).2 Further research was done during the war in Vietnam as part of the Phoenix programme (and others) where, in McCoy’s ironic words, there was “a limitless supply of human subjects” (ibid.: 65).

In 1963, the CIA distilled its findings in its seminal Kubark Counterintelligence Interrogation handbook. For the next forty years, the Kubark manual would define the agency’s interrogation methods and training programs throughout the Third World. Synthesizing the behavioral research done by contract academics, the manual spelled out a revolutionary two-phase form of torture that relied on sensory deprivation and “self-inflicted” pain for an effect that, for the first time in the two millennia of this cruel science, was more psychological than physical. (Ibid.: 50) 3

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2 One Milgram experiment has of course become infamous: see Milgram (1974).

3 The Kubark Manual is now available (but was not then, of course: it was classified as “Secret”) at www.1wt.edu/~nsarchive/NSAEBB/NSAEBB122 (accessed April 2014).
The “Manhattan Project of the mind” paid off for the CIA with “the first real revolution in the cruel science of pain in more than three centuries” (ibid.: 8). McCoy thinks the revolutionary method is “best described as ‘no-touch torture’” (ibid.: 7). I will refer to it as the CIA paradigm of psychological torture or, sometimes, the American way of torture, funded as it was by receipts from US taxpayers provided to CIA by a somnolent Congress. As McCoy indicated, the CIA paradigm of psychological torture has two central elements: sensory deprivation and “self-inflicted” pain.

First, “sensory deprivation became the conceptual core of the agency’s paradigm” (ibid.: 32). What to an ordinary layperson are the amazingly powerful effects of sensory deprivation were summarized in the Kubark Manual, relying on human experimentation done at Harvard, as follows:

Dr. Wexler, Mendelson, Leiderman, and Solomon conducted a somewhat similar experiment on seventeen paid volunteers. ... The results confirmed earlier findings that (1) the deprivation of sensory stimuli induces stress; (2) the stress becomes unbearable for most subjects; (3) the subject has a growing need for physical and social stimuli; and (4) some subjects progressively lose touch with reality, focus inwardly, and produce delusions, hallucinations, and other pathological effects. (CIA 1963: 89)

Kubark goes on to quote another researcher as having said: “Three studies suggest that the more well-adjusted or ‘normal’ the subject is, the more he is affected by deprivation of sensory stimuli” (ibid.). And this section of the manual concludes:

The deprivation of stimuli induces regression by depriving the subject’s mind of contact with an

reality, focus inwardly, and produce delusions, hallucinations, and other pathological effects. (CIA 1963: 89)

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Secretary of Defense Donald Rumsfeld demonstrated the depth of his ignorance about the very CIA techniques he was authorizing for use by the Bush Administration on its prisoners at Guantanamo and elsewhere with his notorious mocking marginal comment on one of the torture-authorizing memos from the Pentagon’s chief lawyer, Waal-113. Haynes, II: “How did I stand for 8-10 hours a day. Why is standing limited to 4 hours? D. R.” (Haynes 2002: 236 [photocopy] and 237 [transcription]). Presumably Rumsfeld shifts position at will when he chooses to stand. Here is one experienced insider’s interpretation of the Rumsfeld scribbling: “It said, ‘Carte blanche, guys’. That’s what started them down the slope. You’ll have My Lais then” (Mayer 2008: 223).

If discussion of torture is to have any semblance of a connection with torture as actually practised, it is essential to remember at least that torture is not some rare and exceptional onetime ad hoc emergency measure, but a carefully researched and tested practice adopted as a matter of policy for a general category of suspects whose psychological equilbrium is if possible, shattered (Constitution Project 2013, Singh 2013). As indicated by the subject line of the above-mentioned Haynes memorandum that Rumsfeld annotated, torture is conceived by its proponents as consisting of “counter-resistance techniques”, where the resistance to be overcome is constituted by what one would normally consider to be a person’s identity, self or personality, embodying her commitments and values. One’s identity as a person is the “resistance” that must be broken! You are the resistance. Whether, once broken, you will ever mend is an open question. Space does not permit also taking up the damaging effects on torturers here, but we have good reason to think that “the toxic dividends of torture are shared by victims and victimizers” (Phillips 2010: xi).


4 Also see CIA (1963: 41), which observes “regression is basically a loss of autonomy”, and ibid.: 50. Cornell’s Hinkle is quoted as assuring CIA: most people who are exposed to coercive procedures will talk and usually reveal sonic information that they might not have revealed otherwise” (ibid.: 83).

5 David Sussman is therefore absolutely correct to observe that “it is perhaps not accidental that many of the most common forms of torture involve somehow pitting the victim against himself, making him an active participant in his own abuse” (Sussman 2005: 22). This not only is not accidental; it is firm policy, in the case of the CIA paradigm. Sussman’s philosophical analysis is one of the most faithful to the actual practices.

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When one reflects on what torture typically consists of specially trained government agents 11,1cing a person captive and assaulting the structure of his personality by the most effective means known to modern psychology – one is strongly inclined to think that torture ought indeed to be absolutely prohibited, precisely as it has been by international law (Waldron 2005b: 1688-91; 2010: 191-94). The first step in the contemporary justification for torture is to attack the absoluteness of the moral and legal prohibitions on a “single mesmerizing example: the ticking time bomb” (Luban 2005: 1440; 2006: 44). The ticking- bomb scenario has appeared in many guises, at least as far back as Bentham’s frequently quoted declaration: “the worst penal measure ... is if possible, shattered (Constitution Project 2013, Singh 2013). As indicated by the subject line of the above-mentioned Haynes memorandum that Rumsfeld annotated, torture is conceived by its proponents as consisting of “counter-resistance techniques”, where the resistance to be overcome is constituted by what one would normally consider to be a person’s identity, self or personality, embodying her commitments and values. One’s identity as a person is the “resistance” that must be broken! You are the resistance. Whether, once broken, you will ever mend is an open question. Space does not permit also taking up the damaging effects on torturers here, but we have good reason to think that “the toxic dividends of torture are shared by victims and victimizers” (Phillips 2010: xi).

METHODOLOGICAL ARGUMENTS

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David Luban analyses the general function of the reasoning focused on ticking bombs, whatever the details of the hypotheticals. Someone who begins by believing that torture ought to be subject to the kind of absolute prohibition found in international law is made to confront what is presented as an undoubted case of torture that is, all things considered, justified. Yes, she is told, torturing anyone is not just wrong but terribly wrong; however, the preventable catastrophe would be an even more terrible wrong, and so - surely! - it would be irrational to allow a much more terrible wrong to occur rather than being willing to commit a less terrible one oneself in order to bring about a rescue by torture. The defender of the absolute prohibition may grant the exception and thus qualify the absolutism of her original position. “Now that the prohibition has admitted that her moral principles can be breached,” Luban observes, “all that is left is haggling about the price” (Luban 2005: 1440; 2006: 44): that is, haggling about how catastrophic the preventable catastrophe needs to be in order to make the torture the better choice, all things considered.

All that one really needs to see, on the contrary, is that the ticking-bomb scenario is not an example of torture as it is practised on planet Earth. First, it might be that one can imagine a possible world in which, although torture is almost never used, it somehow can virtually instantly be employed successfully to deal exclusively with rare emergencies. In a recent essay that breaks new ground, Luban formulates this first reading of my methodological principle as: “Ibid.” (ibid: 202-6).

In my 1978 essay “Torture” I had proposed the methodological principle that “artificial cases make bad ethics” (Shue 1979: 141). Rightly observing that this dictum was left rather enigmatic, Luban notes that in so far as I elaborated it at all, the point seemed to be that it is fallacious to reason from extraordinary cases to ordinary cases with different features from the extraordinary ones (Luban 2009: 196-98). We both still think that this is an important point. It has been the guiding principle here so far and is the reason I have emphasized that real-world torture is done by entrenched (secret) professional bureaucracies with a far lower threshold for using it than any almost certain, imminent catastrophe. Luban formulates this first reading of my methodological principle as:

By focusing on improbable artificial cases, theorists misdirect readers’ attention from genuine issues in the real world to specious issues. They illicitly change the subject from important and authentic questions about the limits of legitimate interrogation in non-TBS [ticking-bomb-scenario] cases to intuition-mongering about a tendentious hypothetical. (ibid.: 197)

I agree that this still matters very much. However, employing extremely generous principles of interpretation, Luban also finds the seeds of interpretation, Luban also finds the seeds of the ticking-bomb scenario to conclusions about, for example, treatment of prisoners at the U.S. prison in Guantánamo, even though the cases are worlds apart (Sands 2008: 117, 135, 158, 170, 191, 200-210). One cannot entirely prevent others from misinterpreting what one writes, but in an area like torture one should take every possible measure to discourage it.

Empirical work on state torture bureaucracies provides explanations of why the practice of torture has the features it has (Bufacchi & Arrigo 2006), not the features built into ticking-bomb scenarios. Fora empirical reasons — psychological, political, sociological and bureaucratic — the carefully limited use of torture is impossible: “history does not present us with a government that used torture selectively and judiciously ... One can imagine rare torture, but one cannot institutionalize rare torture ... It is an optimistic thought with no social embodiment” (Shue 2006: 234, 238). In Brecher’s words, “the institutionalization of the profession of torturer is a necessary condition of the example’s even getting off the ground” (Brecher 2007: 24).

However, a hard-nosed consequentialist willing to bite any necessary bullet can respond by abandoning such fantasies of isolated instances of successful torture in rare emergencies and embracing torture bureaucracies for “permanent” emergencies. “The general point is simple: any finite costs to torture can be outweighed by sufficient expected benefits. The worse the anticipated evil, the more horrible the things we can do to ward it off” (Luban 2009: 201). Now, one might well judge that if this is the direction in which consequentialism is taking us, it i., nine to ball out. In a recent essay that breaks new ground, David Luban suggests two different ways to think about such an exit, one turning on the limits of moral theories in general and one turning on a category of the morally “unthinkable” (Ibid.: 202-6).

Second, in a world of uncertainty and imperfect knowledge, the ticking-bomb scenario should not form the point of reference ... The real debate is not between one guilty man’s pain and hundreds of innocent lives. It is the debate between the certainty of anguish and the mere possibility of learning something vital and saving lives. (Luban; 2005: 1444; 2006: 46-47)
A clear sign of progress in Western society is that one does not need to argue against rape: it is “dogmatically” clear to everyone that rape is wrong. If someone were to advocate the legitimacy of rape, he would appear so ridiculous as to disqualify himself from any further consideration.

~ Slavoj Zizek

Luban comments:

Suppose that the only way Jack Bauer [of Fox’s torture-romanticizing 24] can prevent ten women from being raped is to rape one woman. You will never see that plot-line on television, for obvious reasons: the audience, which is meant to root for Jack Bauer [when he tortures], would find Jack the rapist viscerally revolting. That’s the mark of the moral category” (Williams 1973: 92). Insightful analysts have suggested that the other assault to which torture is most similar is rape (Sussman 2005: 4-5). A column in the New York Times had said:

A clear sign of progress in Western society is that one does not need to argue against rape: it is “dogmatically” clear to everyone that rape is wrong. If someone were to advocate the legitimacy of rape, he would appear so ridiculous as to disqualify himself from any further consideration.

(Zizek 2007)

So, Luban proposes, a final reading of my principle is: “Artificial cases make bad ethics because their very artificiality makes the unthinkable thinkable” (ibid.: 206).

Luban’s two points, about limits of moral rationality and about unthinkability, are closely connected, if not two facets of a single one. If our moral theories generalize from cases where they can be brought into equilibrium with our intuitions, then when they confront a case with radically different features from the original cases and suggest a response that seems intuitively wrong, we may do better to trust our intuition instead of the response that follows from the theory: if the action seems disgusting or revolting and the only reason to do it is that a permission flows out of a moral rule, we may simply have crossed outside the range of reliability of that theory. Perhaps we could construct a better theory that adequately accounts for the horror that torture instinctively arouses. Meanwhile, perhaps we should “stop thinking” in the following very specific sense: avoid following the guidance of a theory the reliability of which is dubious in the range that includes the case at hand. We have good intuitive grounds in our revulsion and disgust to believe that a moral theory that suggests one rape to prevent ten, or one torture to prevent ten, has blundered beyond its competence. Leave the rape and the torture morally “unthinkable” until such time as we have a moral theory that we can be confident is robust enough reliably to guide any thinking we do in this disorienting territory.

SUBSTANTIVE ARGUMENTS

Mercilessness

Space here does not permit discussing the features of the contemporary American way of torture, which are the empirical basis for the arguments, in any detail. David Luban and I elaborated a number of features in the course of showing that McCoy’s “no-touch torture” can easily slip through the crude net of badly drafted US statutes that purport to prohibit torture, revealing a desperately urgent need for re-writing US law on torture. Everyone is to be protected against the new American way (Luban & Shue 2012). We emphasized the mercilessness of all torture:

part of the special wrongfulness of torture lies, then, in the limitlessness of the extent to which the victim is at the mercy of the torturer, who never relents until he himself, for his own reasons, chooses to end the terror which this implants in the victim. The victim can attempt to end the torture by trying to give the torturer what the victim thinks the torturer wants, but the torturer decides entirely for himself what he wants at any given time and whether he believes he has it all. The victim may well guess wrong about what the torturer wants, and often the victim does not have what the torturer wants in any case, especially of course if the victim is not who the torturer thinks he is or has not done what the torturer suspects he has done. All power remains with the torturer, who may move the goal posts as often and as far as he wishes. The victim is utterly at his mercy. Unlike even war, torture has no natural end. It ends when the torturer chooses to end it.

(Ibid.: 859)

Psychological torture in accord with the CIA paradigm, in particular, undermines the structure of the personality — it literally breaks apart the self, unhinging its parts from each other. The victim is reduced to a quivering bundle of fears, driven to try to please, that is, to try to fulfill the wishes of others, with few wishes of her own, except release from the awful psychological stresses that are being systematically and relentlessly imposed by all-powerful others. This goes far beyond what slavery involved and gives new meaning to being at the mercy of someone else.

(Ibid.: 856)

Writing decades later about the psychological effects of his crude old-fashioned physical torture by the SS, much less devilishly fine-tuned than the state-of-the-art CIA paradigm, Jean Amery wrote:

Whoever was tortured, stays tortured. The tortured person never ceases to be amazed that all those things one may, according to inclination, call his soul, or his mind, or his consciousness, or his identity, are destroyed when there is that cracking and splintering in the shoulder joints ... Whoever has succumbed to torture can no longer feel at home in the world ... Trust in the world, which already collapsed in part at the
first blow, but in the end, under torture, fully, will not be regained. That one’s fellow man was experienced as the antithesis remains in the tortured person as accumulated horror. It blocks the view into a world in which the principle of hope rules. (Amey [1966] 1980: 34, 40)6

Lest anyone think that Amery’s loss of what he movingly calls “trust in the world” is a melodramatic exaggeration by a powerful writer, a typical report by a group of empirical researchers finds:

Although the psychological impact of torture on the individual is determined by his/her personality and personal history, in most cases the survivor undergoes irrevocable change. Torture often unleashes a traumatic neurosis with symptoms of recurrent dreams of the traumatic event, anxiety, fear, crying, panic and feelings of helplessness. (Kordott et al. 2007: 204)

**Tyranny**

The best very brief characterization of the American way of torture is law professor Seth: Kreimer’s phrase, “government occupation of the self” (Kreimer 2003-4: 299).7

The CIA paradigm for torture constitutes the most intrusive imaginable assertion of state tyranny over the individual: the elimination of personal autonomy by means of intentionally undermining the structure of that individual’s personality and producing a psychological regression to a less differentiated, compliant servant to the torturer’s master. The new twist in contemporary justifications for the use of torture is that they are forward-looking: the torture is part of the intelligence gathering that will keep us safe from, this time around, terrorists. Torture’s “sole purpose is preventing future harms … It becomes possible to think of torture as a last resort of men and women who are profoundly reluctant to torture …

Torture to gather intelligence and save lives seems almost heroic” (Luban 2005: 1436; 2006: 42).

Luban observes, however, that such a “protective” strategy is in extreme instance of the kind of political tyranny that Western political philosophers, for centuries, and the global human rights movement, especially since the Second World War, have strenuously condemned: “torture is tyranny in microcosm, at its highest level of intensity” (Luban 2005: 1438; 2006: 43). And Luban’s latest, penetrating, “communicative” formulation is: “Torture of someone in the torturer’s custody or physical control is the assertion of unlimited power over absolute helplessness; communicated through the infliction of pain or suffering on the victim that the is meant to understand as the display of the torturer’s limitless power and the victim’s absolute helplessness” (Luban 2014: 128).

**Legal archetypes**

Jeremy Waldron has presented an entirely independent case for the absolute prohibition against torture already found in international law, including the International Covenant on Civil and Political Rights, Articles 4 and 7 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, both of which apply to absolutely everyone, and the Geneva Conventions, which apply to the persons they protect, including prisoners of war. Waldron notes that “[n]o one denies that law has to be forceful and final … But forcefulness can take many forms … [L]aw can be forceful without compromising the dignity of those whom it constrains and punishes” (Waldron 2005b: 1727; 2010: 233-34).

What he calls “an important underlying policy of law” is:

Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects. (Waldron 2005e: 1726; 2010: 232)

The legal prohibition against torture, besides its importance in its own right, serves as an archetype of the policy that legal force is not brutal or savage. The prohibition against torture has kind of iconic significance as a symbolic anchor of the intransgressible requirement that law respect dignity by avoiding brutality. Legal archetypes do foreground work as rules or precedents, and in doing that work they sum up the spirit of a whole body of law that goes beyond what they might be thought to require on the face of it. The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account … but… also operates in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly … (Waldron 2005b: 1723; 2010: 228)

The archetype is a functioning symbol. Waldron explains the working of the archetype as follows:

[The archetype idea is the reverse of a slippery slope argument … Starting at the bottom of the so-called slippery slope argument, I am arguing that if we mess with the prohibition on torture, we may find it harder to defend some arguably less important requirements that … are perched above torture on the slippery slope. The idea is that our confidence that what lies at the bottom of the slope (torture) is wrong informs and supports our confidence that the lesser evils that lie above torture are wrong too … The confidence we have in them depends partly on analogies we have constructed between them and torture. (Waldron 2005b: 1735; 2010: 243)]

If Waldron is correct in his partly empirical hypothesis of the role of the prohibition’s anchoring role in legal argument, it is not surprising that the upsurge in the use of torture by American authorities in the twenty-first century has been accompanied by other governmental assaults — all in the name of national security against terrorists — on fundamental civil liberties, including Congress’s legislation authorizing indefinite detention without trial, thereby assaulting even the ancient principle of habeas corpus. The maintenance of the prohibition on torture may in fact have been the vital protection of a crucial anchor for the general rule of law, which is now shakier in America than it was in 2000 (McKeown 2009, R. Gordon 2014).

The arguments made by Waldron and Luban in 2005 are strongly complementary. Luban, as we saw earlier, focused in 2005 on the evil of state tyranny; Waldron focused at the same time on the evil of state brutality. Contemporary state-of-the-art torture, as we saw at the beginning, is a form of psychological brutality in which the state invades and at least temporarily occupies the mind, removing the “resistance” consisting of the person’s personality structure. A government that uses torture is both tyrannical and brutal: the CIA paradigm uses brutal assault on the individual’s identity to exercise its tyranny over her. Torture is Kreimer’s “government occupation of the self”. An absolute prohibition on torture is a wall against brutal state tyranny, a wall that, as Waldron emphasizes with the idea of a legal archetype, is also part of the larger structure of the rule of law. The rule of law is protection against tyranny and brutality.

**Moral archetypes**

David Rodin has suggested that the absolute moral prohibition on torture may play an archetypal role within our system of moral norms somewhat analogous to the archetypal role of the absolute legal prohibition (Rodin forthcoming). If, Rodin observes, one thinks of the Quinean image of a web of belief at the same time on the evil of state brutality. **"**

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6 Having physically survived until 1978, Amery committed suicide.

7 In his note 73, Kreimer quotes the Supreme Court decision in Stanley v Georgia, 394 U.S. 557 (1969), at 565: "Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds". 

such that beliefs near the centre of the web can be changed only if substantial portions of surrounding beliefs are also changed, the absolute prohibition on torture serves as one of those key central beliefs. My version of this would be that, as Waldron says of the legal case, the absolute moral prohibition is vital in its own right but is also a symbol of the fundamental point that morality demands limits. A person who will stop at nothing is a person without morality. That no one may ever torture is both an instantiation of a firm moral limit and a radiant emblem of intragreenspan moral limitation.

In my account of basic rights, I noted that the enjoyment of every right can potentially be thwarted by any of a multiplicity of “standard threats” (Shue [1980] 1996b: 218 b). A basic right in my sense directly protects one vital interest but in doing so it also blocks a standard threat to other vital interests. For example, a right against CIA-style psychological torture protects the integrity of one’s personal identity, which is intrinsically valuable in the case of every person, but the right against torture also blocks a standard threat against many other rights, such as freedom of assembly and freedom of speech.

If I know that if I go to the square and say what I think, I will be whisked away by government agents and tortured in order to find out who my friends are and what I read, the threatened assault against my psychological stability is also a coercive threat against my free speech. A right that protects me against tortor-hire, partially protects my free speech as well as my mental balance. In this respect this right helps to anchor other rights.

Rodin (forthcoming) makes the significant additional point, however, that one can embrace an absolute prohibition against torture even if one does not believe that the right not to be tortured is absolute: the absolute prohibition does not presuppose an absolute right. Suppose, for example, that just as many people believe that the right not to be killed is not absolute and that one can forfeit it at least some cases by killing someone else, the right not to be tortured aught also be thought not absolute and one could forfeit it in at least some cases by torturing others. Suppose, that is, that one believed that torturing a torturer is not a violation of any right. Because they have forfeited that right, we are assuming for the sake of argument, we would not wrong them by torturing them (especially, perhaps, if in accord with the usual narrative of the ticking-bomb scenario, we might possibly thereby obtain the information that would enable us to destroy a secret site where many other torturers are operating, thereby producing a net reduction in torture, etc.).

Even so, Rodin points out, one might still judge that although it would not wrong the guilty torturer, it would still be wrong — perhaps disastrously wrong — to engage in the torture because it is supremely important to maintain the moral firewall against torture. The function of the absolute moral prohibition against torture as an archetype of the fact that there are some activities in which civilized people do not engage is too important to allow a breach of the prohibition even if the degree of the wrongfulness of torturing the person in question were not reason enough in itself. One is tempted to ask: how bad does it have to be before we torture? Rodin’s point is: nothing compels us to open any discussion of “how bad it needs to be.” We can perfectly well simply say: no torture. As Waldron put it “there are some scales one really should not to be on.” (Waldron 2005b: 1701; 2010: 205, emphasis original).

**SOPHISTICATED INTERROGATION**

But, someone is bound to ask, is all this not too confident? Is it not conceivable that if we never torture anyone, we will sonic day pay a terrible price because we will fail to obtain the only information that would have enabled us to avoid a catastrophe: sonic monumental act of terrorism, for example? This is of course simply one more variant of the ticking-bomb scenario: this time there really is a bomb, and it is a really bad one, and we really will get the information in time, but only if we torture, and so on. Yes, if it is conceivable that if we torture enough people, we will find out something very important, then if we torture no one, we may not find it out, and we may suffer the consequences. Of course, there are all the usual questions about ticking bombs, such as whether we are simply to assume that our intelligence agencies — which did not foresee even monumental developments like the collapse of the Soviet Union and the rise of the Arab Spring, for example — are so good that they immediately have the person who knows most, or, if they have to blunder their way through a sequence of torture victims, each of whom leads them to the next, they will have time to reach the end of the trail. But I want to underline two quite different considerations.

First, we have no empirical basis on which to believe that interrogational torture is the most effective form of interrogation (Kleiman 2006: 130 and n.93). If we torture no one, we may not find out something important — unless we have a better method than torture for finding it out! Space here does not allow a thorough discussion of issues about effectiveness, and I obviously do not believe that torture would be justified if it were effective. But it surely could not be justified only if it were the most effective alternative, given how wrong everyone on all sides admits torture is. A priori it is difficult to understand how the CIA paradigm in particular can be a good method of gathering accurate information. The person whose personality structure is undermined and who is made to regress to an infantile state of wanting to please certainly will be inclined to give the interrogator what the torture victim thinks the interrogator wants. But is this a reliable method of quickly gathering accurate information? It partly depends on how often a person tortured simply does not have the information that he thinks the interrogator wants; in those cases the victim is likely to manufacture something in order to try to please the interrogator. Amery, under SS torture, tried hard to comply but could not because, like any member of a moderately well-run underground, he had been allowed to know only the aliases of his colleagues:

What they wanted to hear from me in Breendonk [Prison], I simply did not know myself. If instead of the aliases I had been able to name the real names, perhaps, or probably, a calamity would have occurred, and I would be standing here now as the weakling I most likely am, and as the traitor I potentially already was. Yet it was not at all that I opposed them with the heroically maintained silence that they could have tortured me to such a situation — I talked. I accused myself of invested absurd political crimes, and even now I don’t know at all how they could have occurred to me, dangling bundle that I was. (Amery 119661 1980: 36)

And even if torture does obtain correct information at some stage, it may well be less efficient than other approaches to interrogation. This is certainly the view of a number of experienced American interrogators. For example, Matthew Alexander (a pseudonym) was a US Air Force interrogator who was instrumental in locating the rural safe house in which Abu Musab al Zarqawi, the leader of al-Qaeda in Iraq, was hiding so that he could be killed by an air strike on 7 June 2006 (Alexander & Bruning 2008). The choice of verb in the title of his account, **How to Break A Terrorist**, is unfortunate because it does not mean what “break” means in the CIA torture paradigm: there is no assault on the personality structure of the person being interrogated. “Break” is the jargon we use to signify getting a prisoner to open up a little — like cracking an egg” (ibid.: 108). Alexander has only contempt for the American torturers with whom he had to serve in Iraq, mainly because of their incompetence, which may involve trying to tear down the prisoner’s self-respect (Ibid.: 185). Alexander gives his prisoners the opposite treatment: “Still, I have given him hope, and hope is the most powerful weapon” (ibid.: 257).

So, is Alexander interrogating with kindness? Far from it: the hope he gives is false hope. He pretends, and tricks, and lies to his prisoners, treating them in ways that in almost any other circumstances would be clearly immoral.

The best interrogators are outstanding actors. Once they create that booth, their personalities are transformed. They ... allow a doppelganger to emerge. What doppelganger is most likely to elicit information from a detainee changes from prisoner to prisoner. Sometimes I must have a wife or children so I can swap stories with the prisoner, though I have neither. (Ibid.: 91)

The interrogation that Alexander practises does not make a pretty picture. He coercively manipulates his prisoners. They are not treated as ends: they are used instrumentally to obtain information. Some people
will certainly feel that it is morally wrong ever to treat people like this.

But it is not torture. Alexander’s technique is unrelenting until he obtains the information he wants, but it is not mercilessly cruel and destructive. No severe pain or suffering, physical or Mental, is inflicted on prisoners. The struggle is a battle of wits. The prisoner’s values and beliefs are not respected: he is, if he can be, tricked into betraying them. He is treated as an enemy and outfitted if possible. But the soundness of neither his body nor his mind is undermined. He is not shamed and humiliated like the men at Guantanamo who were forced to wear women’s Aindenvear and made to learn dog commands like “stay” and “bark” in order to mock their values and undermine their dignity. Alexander’s prisoner may well ultimately regret that his interrogator outsmarted him and obtained the wanted information, but his regret will be possible because his mind will have remained sound, unlike the minds of those assaulted by the CIA torture method. “We don’t have to become our enemies to defeat them” (ibid.: 284).

Of course, the testimony of a single interrogator does not settle which interrogation technique is more effective, torture or something else. I claim only to have illustrated through anecdotal evidence that a serious, smart and successful American interrogator, who personally has conducted three hundred interrogations and supervised more than a thousand, and who was awarded the Bronze Star for service in Iraq, believes that alternatives to torture are more effective. On the other hand, supporters of torture also have only anecdotes at best and fictional accounts (written and film/TV) to support their claims. All the soundness of neither his body nor his mind is undermined. He is not shamed and humiliated like the men at Guantanamo who were forced to wear women’s Aindenvear and made to learn dog commands like “stay” and “bark” in order to mock their values and undermine their dignity. Alexander’s prisoner may well ultimately regret that his interrogator outsmarted him and obtained the wanted information, but his regret will be possible because his mind will have remained sound, unlike the minds of those assaulted by the CIA torture method. “We don’t have to become our enemies to defeat them” (ibid.: 284).

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GUEST COLUMN

PERSONALITY OVER POLICY FOR US CITIZENS

by DAVID SWANSON

Until I remember that I, too, am a human being, I have been with increasing frequency drawn to the conclusion that human beings have evolved with such an obsession with other individual humans that they simply cannot attribute proper importance to far-reaching policies.

If you want to excite a crowd, you don’t tell them that virtually every official in Washington is in complete and harmonious agreement on massive military spending, more nuclear weapons, occupying Afghanistan, bombing Iraqis, bombing Syrians, bombing the hell out of Yemenis, and drone murdering at will. That’s about as interesting as subsidising fossil fuels and rendering the earth uninhabitable. Who cares?

If you want some sign of life out of an audience, you tell them that a particular politician is an idiot or a clown or a racist or a sadist or a misunderstood saint. Now, that has value. That has meaning.

If you want some sign of life out of an audience, you tell them that a particular politician is an idiot or a clown or a racist or a sadist or a misunderstood saint. Now, that has value. That has meaning.

Virtually every U.S. citizen, as far as I can tell, would choose a republic over a democracy, a dictatorship over a republic, and a dictator who gives intelligent humanitarian speeches while enacting horribly destructive policies over a dictator who sounds like a jerk or a moron while enacting less destructive policies.

Sure, we may be headed right for the iceberg, but the Captain sure is witty!

In fact, the actual captain of the Titanic is still remembered for his personality more than his

captaining. Woodrow Wilson is in our history books for things he said, while what he did gets very little mention. Barack Obama will be written up as a president who spoke against nuclear madness, even though (1) he didn’t, and (2) he worked to create more nukes, including smaller, more “usable” nukes.

The corrosive impact of personality may be more lasting than many imagine. I supposed that there would be at least three upsides to a president Trump: no TPP, less hostility toward Russia, and the return to activism of those who opposed wars as long as Bush was president. Not only have the Democrats pushed Trump into hostility toward the demonised Vladimir Putin, but the return of the anti-Republican-war activists is beginning to look over-anticipated.

Where are they? Have they learned to accept all the ongoing permanent wars? Are they waiting for a new war to oppose?

It’ll tell you where they are. They’re lurking just around the corner. Announce a comedy performance mocking the stupidity of Donald Trump and his Russian lover, and they’ll come running. They’ll arrive in droves. 

David Swanson is an author, activist, journalist, and radio host. He is director of WorldBeyondWar.org and campaign coordinator for RootsAction.org. Swanson’s books include War Is A Lie and When the World Outlawed War.
74% of psychology students had received less than one hour of instruction about military medical ethics and most gave incorrect answers when tested on specific instances in which the Geneva Conventions apply, about when military personnel are expected to disobey unethical orders from superiors, or about how prisoners are to be treated.
Since the publication of the Hoffman Report a year and a half ago, we know with certainty that officials at the American Psychological Association (APA) colluded with Department of Defense (DOD) officials as well as the CIA to allow psychologists to participate in interrogations.

The collusion involved manipulating both the composition of panels designed to craft APA policy as well as the content of their proclamations. A handful of individuals within the leadership of the APA— including the APA’s ethics director himself, Stephen Behnke— actively worked towards these ends. They sought both to provide protection to psychologists who participated in torture and also to deceive the APA membership into thinking that their actions were an effort by the APA to protect the health and welfare of the prisoners at Guantanamo and elsewhere. In fact, the APA did nothing whatsoever to promote prisoner welfare.

Why was APA leadership so eager to collude with the DOD? I surmise that part of the reason was because of their long-standing ties to the military which date back to over a century. During both World Wars, for example, the APA enlisted psychologists into military service to evaluate new recruits, assist in the treatment of soldiers with post-traumatic stress, and oversaw their administration reportedly received $81 million dollars for their efforts.

So why was the APA able to collude with DOD for roughly a decade before finally reversing course? Why were relatively few members of the APA protesting the fact that through its policies the APA was condoning psychologist participation in torture and allowing psychologists to employ the “Nuremberg defense” and claim that they were only following the law? Was it perhaps that psychologists were not receiving much education in military medical ethics and the duties of psychologists in military arenas?

In order to find answers, colleagues and I were curious to know what psychology students were being taught about military psychologists’ ethical responsibilities, so we surveyed 185 students at 20 different graduate programs in clinical psychology.

We found that 74% of students had received less than one hour of instruction about military medical ethics and most gave incorrect answers when tested on specific instances in which the Geneva Conventions apply, about when military personnel are expected to disobey unethical orders from superiors, or about how prisoners are to be treated.

To further explore the issue of how much training psychologists are receiving in these matters, in a separate study colleagues and I surveyed the Directors of Clinical Training (DCTs) of 100 doctoral programs in clinical psychology and asked how extensively their programs addressed various topics related to preparing students for resolving ethical dilemmas in military settings as well as about recent controversies regarding psychologists’ consulting to DOD interrogators. Only eight percent of our respondents reported that their programs addressed dilemmas arising when a psychologist in a military setting is ordered to act in violation of ethical guidelines, and none did so extensively. Just over 4% of DCTs said that their curriculum included instruction about conflicts between actions taken and international law. Only about 17% reported that their programs formally addressed issues regarding psychologists’ participation in interrogations in military settings and 12.5% said that they specifically addressed issues regarding psychologists’ participation in so-called enhanced interrogations in Guantanamo.

Based on the results of both of these studies, I surmise that psychology graduate students are taught little about the professional standards that constrain unlawful and unethical practices and, in fact, may have a false sense of complacency about their knowledge of such matters. This is troubling, given that psychologists without an understanding of their ethical obligations are less prepared to disobey, let alone protest, unethical orders, and are more likely to be compliant when told to assist interrogators in ways that violate international standards.

Had the APA followed the lead of the AMA and the American Psychiatric Association in 2005 and prohibited psychologists from participating in interrogation sessions, the entire interrogation program would likely have ended years earlier than it did, because health care personnel were essential to providing cover for interrogators to claim that their techniques were not abusive.

The fact that the detention center at Guantanamo ever opened, much less is still open and continues to abuse detainees— including recently by force-feeding hunger strikers— will likely go down as one of the United States’ most egregious ethical lapses. The fact that any health care provider participated is even worse, compounded by the fact that those in the leadership of the APA provided cover for that participation.

All health care providers need to be educated about the Geneva Conventions and other international codes of ethical conduct to ensure they don’t become pawns of the US military establishment— inadvertently or otherwise. And APA members in particular need to demand that psychologists who committed crimes in the name of patriotism are held accountable and ensure that the APA never again walks down the path toward colluding with torturers, no matter the cause.
Trump in Power

THE ORWELLIAN NIGHTMARE OF DOUBLETHINK IN THE REAL WORLD

Not too long ago the world was left aghast by the sight of the lifeless body of young Aylan Kurdi who had perished while escaping the war in Syria. Kurdi instantly became the poster child for refugees, embodying the hardship they endure along their way. The image rocked the collective conscience of the entire world and many European leaders faced condemnation for denying refugees’ entrance into Europe, sparking protest from pro immigrant lobbies. Europe’s unprecedented refugee crisis provided fodder for the Presidential debate. The American election tilted in favour of a candidate whose political antics were akin to school yard bully. Churlishly and with the impulsive approach, with the stroke of a pen Trump turned thousands of assimilated Americans into outsiders. This word play tore asunder the social fabric of the world’s most advanced society since Rome. The world watched in horror as the demagogue Trump administration announced a crackdown on refugees.

This In-Your-Face attitude that appealed to the majority of white America is not only costing America its clout in world affairs but also causing major embarrassment for diplomats and government officials. The new order of nationalism, closed borders and a travel and trade restriction caused ripples across the world. Following Brexit and Rise of Donald Trump the world’s trade market went into a free fall while Muslims suffered from a rise in hate speech and islamophobia.

With the plain brutish bully that Trump is one cannot help but be reminded of cult classic “1984”. In his ground breaking work, George Orwell warned the citizen to be vigilant against the abuse and misuse of language to appeal to the mass mentality, wherein lies “alternative facts” (a term recently coined by Counselor to the President Kellyanne Conway). Political language as debated by Orwell must be protected from sugar coating, white supremacy under the guise of nationalism and the political correctness of manufactured truth. Divorced from reality, the Trump administration is adamant on imposing its own version of world affairs upon a population who is not ready to dissociate itself from its foreign born neighbours, friends and co-workers.

For Orwell, tyranny hides behind convoluted and deceptive language where words such as peace, freedom and justice become misnomers and are used to normalise torture, injustice and war. In 1984, the military was renamed The Ministry of Peace, and the Trump administration deploys similarly twisted language as it defends its fascism with the euphemistic slogan “Make America Great Again”. In our brave new world privacy is a luxury and messages.

Irrational ideology trumps reason and that is the crux of the 2016 American election. Rationality demands patience and fortitude – two characteristics that are often associated with the educated that the blue collar white majority has come to despise. Preferring an impulsive approach, Trump turned thousands of assimilated Americans into outsiders. This word play tore asunder the social fabric of the world’s most advanced society since Rome. The world watched in horror as the demagogue Trump administration announced a crackdown on refugees.

Following the US travel ban many immigration advocates fear that other countries may follow suit. Sadly when the Kuwaiti government announced a travel and visa ban for Syrians, Iraqis, Iranians, Pakistanis and Afghans there was not much media frenzy. The Kuwaiti authorities emphasised that no exception would be permitted, but added that the ban was temporary, and will be lifted when the security situation stabilises.

The world inches towards another World War where, in the words of senior Chinese military official, war with the US is “not just a slogan” but is becoming a “practical reality” with such beliefs reiterated by Trump’s closest advisor and bigot Bannon, who stated in his radio show “We’re going to war in the South China Sea in five to 10 years, aren’t we?” One wonders if humanity is a lost cause. What began as Islamic terrorism has quickly spiralled into all-out nationalism and a world deeply divided along religious, ethnic and racial lines.

One can only hope that peace and rationality prevail in time to let us work together for the cause of all humanity and transcend our differences. The world sits idly by, watching ethnic conflicts flare up as if these were mere entertainment rather than human beings whose lives are being destroyed. The existence of even a single refugee should be a cause for alarm throughout the world.

Every day Muslims across America complain of online harassment and receiving threatening emails and messages. Banning refugee and immigrants from Muslim majority regions is discrimination on the basis of religion, a blatant infringement of first amendment rights and a contravention of human rights standards. So often the world sits idly by, watching ethnic conflicts flare up as if these were mere entertainment rather than human beings whose lives are being destroyed. The existence of even a single refugee should be a cause for alarm throughout the world.
REVIVING THE TORTURE RATIONALE

Donald J. Trump’s Presidency

“Do you catch a mouse and keep beating it until it admits it’s really an elephant?”

South African proverb

The most pressing question in the torture stakes will be its revival as a state policy under a Trump administration. Donald J. Trump’s approach to such matters remains that of entertainer-in-chief rather than cold politician: he wishes to get results more in tune with emotional response rather than tangible effect. Such a disposition presents a range of dangers to both the US Republic and perhaps everybody else.

What has mattered in the debate is the sanitising of torture as a principle. Debates continue to take the teeth out of interrogative practices that unquestionably amount to torture. Despite being prohibited across a range of international and domestic instruments, States tend to slip into habits of brutal extraction, bickering over degree. In situations of emergency, those with portfolios against the practice of torture would defer to the defence secretary, James Mattis, and CIA Director, Mike Pompeo, over the issue, but felt that such techniques as water boarding had a role: “absolutely I feel it works.”

As to whether Trump knows it works is quite something else. Such debates tend to be heavy with emotional suggestion. Evidence of its value is scanty, though the overwhelming sense from interrogators is that truth has a curious habit of slipping away when the subject is worn by the effects of a cruel torture regime.

The quality of information suffers as a result, as the confessed lacks perspective. The caught mouse, in other words, shall eventually have to admit it is an elephant.

The crux of Trump’s embrace for firmer, harsh techniques against such groups as Islamic State hinges on the idea of retaliatory vengeance. These terrorist groups, he explained, “chop off the citizens’ or anybody’s heads in the Middle East, because they’re Christian or Muslim or anything else... we have that and we’re not allowed to do anything. We’re not playing on an even field.”

Rather than embracing a higher ground of ethical purity with pragmatic effect, he prefers to descend into the pits of hell, charging away towards a blood ready equivalence. “When ISIS is doing things that nobody has ever heard of since medieval time, would I feel strongly about waterboarding? As far as I’m concerned we have to fight fire with fire.”

Those who stand firmly against the practice of torture have gone back to the definitional board, hoping Trump will listen to their counsel. “Without any doubt,” claims Nils Melzer, UN special rapporteur on torture, “waterboarding amounts to torture.”

For the US to adopt such techniques as water boarding would “set back into the torture business.”

Such a “business” is also bound to be problematic for other intelligence services that rely on the US in security partnerships. What to do with information, however invaluable, actually tainted by the stain of torture?

Protocols for several countries are in place for officials to absent themselves where torture is taking place, a long standing hypocrisy in the intelligence game. To then make use of that material potentially places such countries as Britain, Australia, New Zealand and Canada at risk of violating international law. That, of course, has not prevented them from doing so before.

Despite suggesting he would defer to Mattis and Pompeo, neither seemed to realise Trump’s moves on the subject of what he would do next. Their master is proving not only enigmatic but irritatingly slippery. Political went so far as to claim that they had been “blindsided” by a draft order requesting the CIA to revisit previous interrogation techniques.

White House press secretary Sean Spicer was a picture of confusion, claiming he had “no idea where it came from” and that it was “not a White House document.” It perhaps stands to reason, notably in the case of Mattis, who is on record advocating beer and cigarettes as more appropriate forms of inducement in the interrogation room.

Others question the effect any such Presidential direction would have. Senator John McCain is resigned to a president delusional about the effect of any executive order bringing back torture practices. “The president can sign whatever executive order he likes but the law is the law. We are not bringing back torture in the USA.”

Such confusion might give hope to anti-torture advocates, though Trump seems determined to stir the viciousness of the interrogating patriot, right or wrong.

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1 http://www.independent.co.uk/news/world/americas/donald-trump-waterboarding-torture-united-nations-specialist-a7554821.html

2 http://www.politico.com/story/2017/01/torture-mattis-pompeo-defense-234180

3 http://www.bbc.co.uk/news/world-us-canada-38763801
US Congress. Among those elected representatives was a certain Michael Pompeo, who hailed from Kansas. This man, who is on record defending US torturers as patriots while a congressman, is now the director of the CIA in Donald Trump’s new regime. His appointment was supported by all but one member of the committee in charge of approving Pompeo’s selection. The lone dissenter was the libertarian Rand Paul. In other words, members of the so-called opposition party (the Democrats) sitting on the committee agreed to the appointment, most likely accepting Pompeo’s assurances that he would only use torture in specific cases.

I mention this appointment not because Trump’s choice was out of character. One need only look at the rest of his choices for high ranking appointments to understand that the Trump government will be one of the most right-wing, self-serving, militaristic and potentially fascist regimes to ever rule the United States. No, the reason I mention this appointment is because of the vote by the Democrats to approve a man who not only supports torture, but champions it. Now, I am not so naïve to believe that most of the rulers in Washington have any morals beyond that which makes them money or gives them more power, but to ignore torture (and thereby tacitly support it) is unconscionable. The fact that there is so little outcry around this appointment is one more element of proof as to the moral vacuum that is the US establishment. When combined with the other elements of what the regime calls the “war on terror”–drone murders, Special Forces missions to kill and destroy, surveillance of everyone, etc.—it becomes clear that Washington has no right to claim any moral leadership of any sort. This truth is certain to become even greater as the Trump regime rolls out more and more of its executive orders without challenge from the legislative wing of that regime.

As I was writing this, a news item came across my desktop stating that Trump is going to issue an executive order lifting the ban on the use of “black site” prisons overseas in client states and nations occupied by US forces. This order overturns the order Obama invoked when he took power; an order that ended the use of such prisons by US military and intelligence forces. Black site prisons are utilised specifically for interrogation that involves torture because they provide a legal deniability on the part of Washington. One of the reasons given for reviving these torture chambers is that some of the people held and tortured by the US and its allies have returned to the battlefield. Let me remark (and yes I believe there is an element of equivalency here) that thousands of US troops returned to the battlefields of the “Global War on Terror” numerous times to fight and kill. Yet, they are not being tortured and detained for their actions. Does torture work for the torturer? Do they get the information they need or does it merely fulfill a need for revenge?

Author Valentine quotes Ed Murphy, a former operative in the Phoenix program, in his book on the operation. According to Murphy, “Phoenix was far worse than the things attributed to it.” One can assume this is also the case in regards to the torture of detainees carried out since the events of 9-11. Indeed, the refusal by the Obama administration to release thousands of photographs taken in the torture chambers of Abu Ghraib suggest that the photos that were released are tame compared to those censored by the regime. The apparent acceptance of this censorship and the human rights abuses it is covering up is one more reason to call out the torturers and remove them from their offices and positions. Failing to do so reflects on us all.

Donald Trump is on record stating that he believes “torture works.” I wonder exactly what this concept means. Does torture work for the torturer? Do they get the information they need or does it merely fulfill a need for revenge? In other words, are Trump and other who insist that torture works merely revealing that it is there psychological need to inflict pain on a perceived enemy? Is this what they mean when they say torture “works?” After all, most military experts disagree with those who say torture provides valuable information.

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**GUEST COLUMN FIRST HAND ACCOUNT**

# TORTURE IN THE AGE OF TRUMP

Torture is considered a grave breach of the Geneva Conventions, also ratified by the United States. Geneva classifies grave breaches as war crimes.

by MARJORIE COHN

During the presidential campaign, Donald Trump declared he would “immediately” resume waterboarding and would “bring back a hell of a lot worse than waterboarding” because the United States is facing a “barbaric” enemy. He labelled waterboarding a “minor form” of interrogation.

Waterboarding, which involves pouring water into the nose and mouth to make victims feel like they’re drowning, has long been considered torture, which is a war crime under US and international law. Indeed, the United States hung Japanese military leaders for drowning, has long been considered torture, which is a war crime under US and international law. Indeed, the United States hung Japanese military leaders for waterboarding as a war crime after World War II.

The United States has always prohibited torture — in our Constitution, laws, executive orders, judicial decisions and treaties. When we ratify a treaty, it becomes part of US law under the Supremacy Clause of the Constitution.

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture,” the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the US ratified, states unequivocally.

Torture is considered a grave breach of the Geneva Conventions, also ratified by the United States. Geneva classifies grave breaches as war crimes.

The US War Crimes Act and 18 USC, sections 818 and 3231, punish torture, wilfully causing great suffering or serious injury to body or health, and inhuman, humiliating or degrading treatment.

And the Torture Statute criminalises the commission, attempt, or conspiracy to commit torture outside the United States.

## TORTURE IS ALWAYS ILLEGAL

What does torture have in common with genocide, slavery and wars of aggression? They are all “jus cogens.” That’s Latin for “higher law” or “compelling law.” This means that under international law, no country can ever pass a law that allows torture. There can be no immunity from criminal liability for violation of a “jus cogens” prohibition.

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## TORTURE DOESN’T WORK

Trump said he would approve the use of waterboarding “in a heartbeat” because “only a stupid person would say it doesn’t work.” But even “if it doesn’t work,” he added, “they deserve it anyway, for what they’re doing.”

Experts agree that torture does not work. A 2006 study by the National Defense Intelligence College found that traditional, rapport-building interrogation techniques are extremely effective even with the most hardened detainees, but coercive tactics create resistance and resentment.

Interrogators concur that torture is not efficacious to glean intelligence. Glenn L. Carle, who supervised the 2002 interrogation of a high-level detainee for the CIA, told The New York Times that coercive techniques “didn’t provide useful, meaningful, trustworthy information.”

Likewise, Ali Soufan, a former FBI Supervisory Special Agent who conducted several high-profile terrorism interrogations, testified before Congress that harsh interrogation techniques “are ineffective, slow, and unreliable, and as a result harmful to our efforts to defeat al Qaeda.”

Matthew Alexander, a former senior military interrogator who supervised or conducted 1,300 interrogations in Iraq, which led to the capture of several al-Qaeda leaders, echoed Soufan’s sentiments. Alexander said, “I think that without a doubt, torture and interrogation techniques slowed down the hunt for Bin Laden.”

Both Senators John McCain (R-Arizona) and Dianne Feinstein (D-California) said that torture did not lead us to Bin Laden. The United States located Bin Laden with traditional interrogation methods over several years.

When I testified in 2008 before the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties about Bush administration interrogation policy, one of the Republican congressmen asked me how I would fashion an interrogation statute. I replied that it would require humane, kind, respectful treatment to develop trust. As the questioner sniggered, international law expert Professor Philippe Sands, who also testified on the same panel, said I was correct, that the British got much better intelligence from the Irish Republican Army when they used humane techniques.

Torture is also counter-productive. Former Navy General Counsel Alberto Mora testified before
Congress that the two most effective recruiting tools for those who would do harm to US soldiers in Iraq were Abu Ghraib and Guantánamo. When people see the US government torturing detainees from their countries, they resent us even more.

Indeed, an interrogator who served in Afghanistan, told Forbes, “I cannot even count the amount of times that I personally have come face to face with detainees, who told me they were primarily motivated to do what they did, because of hearing that we committed torture…. Torture committed by Americans in the past continues to kill Americans today.”

TRUMP CABINET NOMINEES CLAIM TO OPPOSE TORTURE

Several of Trump’s cabinet nominees were asked about waterboarding and torture during their confirmation hearings. Although some were on record favouring torture in the past, all declared their opposition to it, saying it was illegal.

Rep. Mike Pompeo (R-Kansas), Trump’s pick for CIA Director, has defended the use of waterboarding, saying that while torture was illegal, waterboarding was not torture. He criticised the 2014 Senate report, saying, “These men and women are not torturers, they are patriots.” Pompeo opposed closing the CIA’s “black sites” where the Bush administration pilfered torture.

But when asked at his hearing whether he would allow “enhanced interrogation techniques” (a euphemism for torture) to be used if so ordered by Trump, Pompeo categorically replied, “Absolutely not.” He added, however, “I can’t imagine I would be asked to do that by the president-elect.”

In his written answers to Senate Intelligence Committee queries, Pompeo was not so absolute, leaving open the possibility that the Trump administration would use torture. Pompeo wrote that he would ask CIA agents whether the limitations in the Army Field Manual constitute “an impediment to gathering vital intelligence to protect the country.”

Attorney General Jeff Sessions has supported waterboarding, saying “it worked” in extracting information. But he admitted in his testimony that “waterboarding or any other form of torture is absolutely improper and illegal” as Congress has outlawed it, although he voted against that legislation.

The Office of Legal Counsel (OLC) is a division of the Department of Justice, which provides legal advice to the president and all the executive branch agencies. As head of the Justice Department, Sessions would oversee and have the power to replace the head of the OLC. It was OLC lawyers, including notably John Yoo and Jay Bybee, who wrote memos advising the Bush administration how to illegally torture people and get away with it.

Secretary of State Rex Tillerson testified that he opposes torture.

Although the International Committee of the Red Cross described interrogation techniques used at Guantánamo as “tantamount to torture,” Department of Homeland Security Secretary Gen. John Kelly said that criticism of detainee treatment was “foolishness.” Kelly, a former Marine, oversaw interrogations at Guantánamo.

Kelly defended the force-feeding of hunger strikers at Guantánamo, a practice the UN Human Rights Commission called torture. “After a mass of hunger strikes that were threatening to destabilise the prison, [Kelly] engaged in a retributive campaign, including aggressive force-feeding and solitary confinement to punish strikers,” UN Special Rapporteur on Torture Juan Mendez said.

At his hearing, however, Kelly stated he “absolutely” would abide by US laws prohibiting waterboarding and torture.

Gen. James Mattis, Trump’s new Secretary of Defense, opposes torture because it doesn’t work.

Trump told The New York Times that when he asked Mattis what the general thought of waterboarding, Mattis replied, “I’ve never found it to be useful. I’ve always found, give me a pack of cigarettes and a couple of beers and I do better with that than I do with torture.” Trump was “very impressed by that answer. I was surprised, because [Mattis is] known as being like the toughest guy.”

Eliot Cohen, a former senior official in the George W. Bush administration, told the Senate Armed Services Committee that “[Mattis] would refuse to comply” with a presidential order to torture.

But Trump said if Americans feel strongly the US government should bring back waterboarding and other torture techniques, “I would be guided by that.”

TORTURE BY THE BUSH ADMINISTRATION

In late 2014, the Senate Select Committee on Intelligence released a 499-page executive summary of its 6,700 page classified torture report, which says several detainees were waterboarded. One detainee in CIA custody was tortured on the waterboard 183 times; another was waterboarded 85 times.

The summary states that the CIA used “rectal feeding” without medical necessity on prisoners. A mixture of pureed hummus, pasta and sauce, nuts and raisins was forced into the rectum of one detainee. “Rectal rehydration” was also utilised to establish the interrogator’s “total control over the detainee.”

Other “enhanced interrogation techniques” documented in the summary included being slammed into walls, hung from the ceiling, kept in total darkness, deprived of sleep — sometimes with forced standing — for up to seven and one-half days, forced to stand on broken limbs for hours on end, threatened with mock execution, confined in a coffin-like box for 11 days, bathed in ice water, dressed in diapers. One detainee “literally looked like a dog that had been kennelled.”

The summary contains examples after example of why “the use of the CIA’s interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation.” It says: “Multiple CIA detainees fabricated information, resulting in faulty intelligence… on critical intelligence issues including the terrorist threats which the CIA identified as its highest priorities.” Yet the CIA had continually lied that the techniques “saved lives.”

Shortly before the report summary was made public, Obama stated, “We did a whole lot of things that were right” after 9/11, “but we tortured some folks.”

The interrogation policy that permitted torture and abuse came from the top. Bush, Dick Cheney, Condoleezza Rice and John Yoo admitted they participated in decisions to subject prisoners to waterboarding.

In a practice called extraordinary rendition, the CIA sent men to other countries where they were viciously tortured, in violation of the Torture Convention.

Yet the Bush administration’s legal mercenaries, including Yoo and Bybee, wrote memos with twisted reasoning that purported to justify torture, and advised high government officials how to avoid criminal liability under the US War Crimes Act.

Those who engaged in hunger strikes were brutally force-fed, a practice that the United Nations Human Rights Commission called torture. Force-feeding continued under Barack Obama.

OBAMA REFUSED TO FULFL HIS CONSTITUTIONAL DUTY TO PROSECUTE TORTURERS

In 2005, Congress passed the Detainee Treatment Act, which prohibits cruel, inhuman or degrading treatment or punishment of anyone in the custody of the US government, including prisoners at Guantánamo. The act also restricts interrogation techniques to those allowed by the Army Field Manual.
One of Obama’s first acts as president was to order that no government agency would be allowed to use interrogation methods, including waterboarding, not listed in the Army Field Manual.

He stated, “I will continue to use my authority as president to make sure we never resort to those [torture] methods again.”

Yet Obama has consistently refused to hold the officials who authorised torture during the Bush administration legally accountable, despite his constitutional duty to “take care that the laws be faithfully executed.”

Gen. Barry McCaffrey noted, “We tortured people unmercifully. We probably murdered dozens of them during the course of that, both the armed forces and the CIA.” Maj. Gen. Antonio Taguba, who directed the Abu Ghraib investigation, wrote, “there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.”

The answer to Taguba’s question is a resounding “no.” Obama said, “My view is also that nobody’s above the law and, if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen. But,” he added, “generally speaking, I’m more interested in looking forward than I am in looking backwards.”

Eric Holder, Obama’s attorney general, investigated only two of the most egregious instances of torture, the deaths of Gul Rahman and Manadel al-Jamadi, stating that his Department of Justice “determined that no government agency would be allowed to use interrogation methods, including waterboarding, not listed in the Army Field Manual. Nevertheless, Holder ultimately refused to prosecute the Bush officials responsible for the torture and deaths of those two men.

Last fall, an International Criminal Court prosecutor said there was a “reasonable basis” to open investigations into the war crime of torture in detention facilities run by the CIA and the US military in Afghanistan.

The Obama administration’s refusal to bring the torturers to justice sends a clear message to future administrations — including the incoming one — that they can use torture with impunity.

Moreover, if the United States does return to the bad old days of torture, “what kind of message would that be to the world?” asked Nils Melzer, UN special rapporteur on torture. “If the United States does it, those other countries will know they can get away with it. The last thing the world needs is a US president legitimising this.”

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counter-terrorism measures in Sri Lanka. It appears that these measures propagate the very oppressive elements (inducement, threat or promise) purporting to be restricted by the Ordinance. This is because these measures also equip the police with powers to use oppressive methods to interrogate a suspect by: (a) allowing indefinite detention outside judicial protection; (b) ensuring the secrecy of the investigation process; and (c) retracting the right to silence of the suspect. In contrast, counter-terrorism laws retrace the suspect’s right to silence by enacting specific provisions that force the suspect to cooperate with interrogators. Section 5 of the PTA provides that failure to report any information related to an act of terrorism is a punishable offence.

The provisions that allow the indefinite detention of suspected terrorists effectively remove suspects from the protection of the judiciary, allowing them to be lost in a realm of secrecy, held by paramilitary institutions. This secrecy is reinforced by the state’s bureaucracy (by issuing detention orders) and the code of silence upheld by the rank-and-file of the police. The police often argue that maintaining the secrecy of an interrogation is the only way to protect the evidence and other witnesses, who could be influenced by the suspect in their custody. However, according to McConville et al., shielding police interrogation from external scrutiny has historically been viewed with ‘deep suspicion’. The secrecy surrounding investigative processes helps the police to reject claims of ill-treatment of suspects and to dismiss their liability, because the suspect is unable to bring independent evidence to prove their exposure to abuse while in custody. In particular, during a period of a state of emergency, temporary measures taken by the state to prevent suspects from accessing any evidence that could prove any inducement, threat or promise on the part of the police.

The voluntariness of a confession derives from the suspect’s right to silence; thus, a confession is presumed to be voluntary only if the suspect was able to exercise this right. Although the Constitution of Sri Lanka does not guarantee the right to silence, section 110 (2) of the Code of Criminal Procedure explicitly protects a suspect’s right to silence. This section that the suspect is bound to answer the questions of a police interrogator but that the suspect does not have to provide answers that could ‘expose him to a criminal charge’. In contrast, counter-terrorism laws retrace the suspect’s right to silence by enacting specific provisions that force the suspect to cooperate with interrogators. Section 5 of the PTA provides that failure to report any information related to an act of terrorism is a punishable offence.

It is clear that these secretive investigative mechanisms are designed to allow, if not encourage, the police to apply oppressive methods and coerce confessions from suspects. Behind closed doors, the police can apply pressure or force such as deprivation of food and sleep or physical assault against tough or silent suspects who are not willing to speak. Further, the Emergency Regulations authorise the police to dispose of the bodies of suspects without conducting an autopsy—a provision that has been criticised as ‘active encouragement’ of torture of suspects in custody, and for institutionalising abusive practices. During the field interviews, a senior police officer denied that police assault suspects in custody in the present day, although admitted that such assaults have been widely practised in the past.

The officer added: ‘As the police officers are now appointed, disciplined, and dismissed by an independent commission, the officers are not risking any complaints from the suspects. If a complainant goes to the Supreme Court to file a fundamental rights application, the officer could be temporarily or permanently dismissed or even be asked to pay compensations’.22 Defence lawyers disagree: ‘Despite the clear wording of our Constitution, enunciating the presumption of innocence, persons arrested by the police are, more often than not, presumed guilty and treated in like fashion’.23 A defence lawyer who had appeared for many Tamil Tiger suspects said: ‘At least 70% of the suspects had been severely tortured and the rest have been assaulted […] Once I recall outside the courtroom one police officer casually admitting, “we hit them and type the confession. The ASP only signs papers later”’.24

There is an endemic belief among Sri Lankan police officers that ‘the only way to get the truth from the suspect is to bash them’.25 Some are of the opinion that ‘if torture is not allowed in the police stations, they will have to close down the stations and go home’.

20 Even ordinary suspects (not terrorist suspects) such as common thieves or sex workers in Sri Lanka are subjected to torture and other types of ill-treatment on an almost daily basis. It is evident that terrorist suspects who are held in special units and under long-term detention orders, with limited or no access to the outside world, are treated far more brutally than are common criminals. This harsh reality is reiterated in Ramani’s story: ‘I was arrested by the police while I was at work. I was not given any reasons for the arrest. They forced me to get into the police jeep. There were four police officers including the driver. The police officers assaulted me in the jeep, slapping across my face, kicking me with their boots, stabbing with their guns and they abused me using filthy words. I told them that I want to see my parents but my parents were not informed of my whereabouts. I was taken to a dark room without windows. I was interrogated for a long time. The interrogating team included 12 police officers but there were no female officers. The officers said that I was arrested because they received information that I had been supporting Tamil Tigers. I denied all the allegations because I did not have any connections with Tamil Tigers. One officer was seated with a typewriter and typed while the others interrogated me. I was not allowed to see what was typed.’

21 Field interviews, Colombo (June 2007).

22 See Harlan and Dabooiwala, The Other Lanka. Also see Fernandez and Purvimanasinghe, X-ray of the Sri Lankan Policing System.

23 Field interview (August 2007).

Dr. Visakesa Chandrasekaram worked as a human rights lawyer and an independent social critic, practitioner in Sri Lanka and Australia. He has written and presented several creative pieces including Forbidden Area, a play, The King and the Assassin, a fiction and Transplant, a feature film.

5 See Chapter 1.

6 See Chapter 1.

7 The detention order is issued by the Ministry of Defence. Based on the evidence obtained from the field observations and interviews, the police do not acknowledge that they have arrested a particular suspect and the suspect’s whereabouts may be concealed for a long time. Also see the example of Veerakarthi in Chapter 3.

8 Field interviews, Colombo (June 2007).

9 McConville et al., The Case for the Prosecution, p. 56.

10 Field interviews, Colombo (June 2007).

11 The term ‘disappearance’ is used in Sri Lanka to explain the fact that a person has been arrested by unidentified personnel.

12 Field interviews, Colombo (June 2007).

13 Field interviews, Colombo (June 2007).

14 The UN Special Rapporteur on Torture reported that torture and other forms of ill-treatment are employed on a widespread basis by members of the security forces in Sri Lanka, particularly against Tamils held in detention. See E/CN.4/1999/61, paras. 699-669, in Dias, ‘The role of the Attorney General’, p. 342. Also see the discussion on command responsibility and vicarious liability on perpetrating torture that appears in Jayawardene, Catching the Big Fish, pp. 6, 7, 32-39.

15 Field interviews, Colombo (June 2007).

16 Field interviews, Colombo (June 2007).

17 Sumanthakul, Torture, p. 96.

18 Field interviews (June 2007). The lawyer did not seem to consider physical assault such as slapping to be a form of torture.


21 See Harlan and Dabooiwala, The Other Lanka. Also see Fernandez and Purvimanasinghe, X-ray of the Sri Lankan Policing System.

22 Field interview (August 2007).
International law is still in that formative stage wherein it must continually draw upon equity, ethics and the moral sense of mankind to nourish its developing principles. ~ C.G. Weeramantry,
The Lord’s Prayer: Bridge to a Better World

On 5 January the most illustrious international jurist of Sri Lanka, Christopher Gregory Weeramantry, passed away. He served as a Judge of the Supreme Court from 1967 to 1972. Justice Weeramantry proceeded to become Sir Hayden Starke Professor of Law at Monash University where he became much published and deeply respected by the legal intelligentsia of Australia. He was, during his academic tenure in Melbourne, the pride of the Sri Lankan community, being a beacon that shone the community’s dignity and cultural and educational heritage in a society that was shrugging off the bigotry of the white Australian policy of immigration.

The author of this article was a graduate student at that time in the Faculty of Law at Monash and basked in the radiance of one of the most eminent legal scholars in the law school. Professor Weeramantry’s book The Law in Crisis: Bridges of Understanding published in 1975 was the talk of David Derham School of Law at Monash at the time. The book was hailed by another distinguished judge A.R.B. Amerasinghe as “apocalyptic and revealing”. Lord Denning, who wrote the Foreword to the book, commented: “This book appears at a critical moment in the history of mankind. Civilised societies seem to be disintegrating…”

We not only had a brilliant scholar from our country at the helm of academia at our law school but also a mentor and friend. For many of us Sri Lankan students at Monash from the law, engineering, science and educational faculties as well as the school of humanities, Uncle Christie’s home was always open. He was gracious, accommodating and patient with us. Despite his impressive legal stature, the equality with which he treated us students, with the utmost dignity and unobtrusive conviviality, was indeed an inspiration.

Professor Weeramantry went from Monash to become a Judge of the International Court of Justice (ICJ) from 1991 to 2000 and served as its Vice-President from 1997 to 2000. He permeated his judgments in that august assembly of justice with his deep legal and classical knowledge and his enduring belief in international humanitarian law. He brought with him the unique heritage of his country of birth which is home to four major religions and infused the law with the tenets of those religions to bring to bear the moral imperative of the sanctity of human life. Judge Weeramantry blended together the forgiveness of Christianity; the tolerance and kindness of Buddhism; the wisdom of the Hindu religion; and the humanity professed by the Islamic faith into the majesty of his judgments and the profundity of his writings. His steadfast stance against any use of nuclear force by any State, under any circumstances, where other judges of the International Court of Justice reversed their position when it came to self-defense, was uncompromising. In his dissenting opinion in the Nuclear Arms Case Judge Weeramantry said: “My considered opinion is that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23(a) of The Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

I regret that the Court has not held directly and categorically that the use or threat of use of the weapon is unlawful in all circumstances without exception. The Court should have so stated in a vigorous and
forthright manner which would have settled this legal question now and forever”.

The acute awareness of the harm caused by environmental damage was another aspect reflected in his judgment: “Nuclear weapons have the potential to destroy the entire eco-system of the planet. Those already in the world’s arsenals have the potential of destroying life on the planet several times over. Another special feature of the nuclear weapon, referred to at the hearings, is the damage caused by ionising radiation to coniferous forests, crops, the food chain, livestock and the marine eco-system”.

When two Libyan men were accused of causing the explosion of a bomb in the Pan Am Flight 103 over the town of Lockerbie, Scotland, on 21 December 1988, which killed all 259 passengers and crew, as well as eleven residents of the town of Lockerbie, the UK and US Governments requested Libya to extradite the accused so that they could be prosecuted in Scotland or in the United States. The matter came up before the International Court of Justice where Judge Weeramantry was one of the Bench hearing the case. One of the issues in the case was whether the Court had jurisdiction to issue provisional measures as applied for by Libya, in the face of Article 25 of the United Nations Charter which obligated member States to carry out decisions of the Security Council, which impliedly precluded the members from being obligated to carry out measures prescribed by the ICJ. Judge Weeramantry opined that both the Security Council and the Court were created by the Charter and therefore were complimentary to each other, ascribing to the court much needed credibility and jurisdiction. As part of his judgment, Justice Weeramantry said: “A great judge once said that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are not powerless to prevent the clash of arms. The entire law of the United Nations has been built up around the notion of peace and the prevention of conflict... the Court, in an appropriate instance where possible conflict threatens rights that are being litigated before it is not powerless to issue provisional measures conserving those rights by restraining an escalation of the dispute and the possible resort to force”.

In his book The Lord’s Prayer: Bridge to a Better World, published in 1998, Judge Weeramantry avers to the problem of refugees (boat people) and his description fits to a tee what is happening in Europe nearly twenty years later: “Today’s wars and internal persecutions result in streams of refugees turning up at national boundaries with their pitiful possessions, their infants in arms and their memories of loved ones lost in the violence or during their arduous journey. They arrive in other countries in such great numbers that the host countries are quite often unequal to the task of handling them. Many of them, such as “boat people” lose their lives at sea in their bid for freedom... Moreover, a new species of environmental refugees is expected to present new problems in the next century”. Judge Weeramantry refers to rising water levels, earthquakes, nuclear plant disasters, all causing droves of refugees to seek shelter from environmental disasters.

His was a theory of justice focused on human needs and aspirations; one of categorical imperatives which attenuate the fairness of ethics and the purity of religious thought. In the Foreword written in the author’s book Aviation Trends in the New Millennium, Justice Weeramantry observes that legal practice in the future will be transformed in a manner requiring knowledge of domestic and international law. Judge Weeramantry epitomised what Lord Atkin said in Ambed v. Attorney General of Trinidad and Tobago: “Justice is not a cloistered virtue. She must be allowed to suffer the respectful, even though honest, comments of ordinary men”.

He will be remembered not only for his insightful analyses of complex legal issues, which he broke down to their simplest forms, but also for his erudition and for a lasting legacy of a visionary interpretation of the law and the theory of justice.

A TRIBUTE

SIR NIGEL RODLEY

CHAMPION OF HUMAN RIGHTS

The author was awarded the degree of master of laws by Monash University in 1982; the degree of doctor of philosophy by the University of Colombo in 1992; and the degree of doctor of civil laws by McGill University in 1996. He is a former Head of International Relations and Insurance at Airlanka and former Senior Legal Officer at the International Civil Aviation Organization. He is currently a Senior Associate at Aviation Strategies International, headquartered in Montreal.

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So many of us grieve the loss of a friend, a mentor, a rigorous scholar and a world-renowned champion of human rights.

Although I had known and admired Nigel for many years and considered him a dear friend, it was in my capacity as UN Special Rapporteur on Torture (2010-2016) when I felt the full influence of his experience, his generosity of spirit and his wisdom. He had blazed a trail for international protection of human rights when he had occupied the same Rapporteurship between 1992 and 2001, among other things by writing the ultimate treatise on the rights of persons deprived of liberty under international law.

He had also been responsible for much of the sophisticated normative framework with which international law addresses torture and ill-treatment in all its forms, including contributions to the drafting of the UN Convention Against Torture, in his previous capacity as Legal Counsel for Amnesty International.

As the UN Special Rapporteur he also advanced normative developments as he joined many others in crafting the Istanbul Protocol on the forensic detection of torture and medical and psychological treatment of survivors; most recently he had committed to participate in the process of strengthening its implementation worldwide.

During my tenure, he contributed extensively to our consultations that eventually shaped our thematic reports in important subjects like the death penalty and the absolute prohibitions on torture and ill-treatment, and the review of the UN Standard Minimum Rules on the Treatment of Prisoners, now revamped and named the Nelson Mandela Rules.

His wise advice on such issues was only surpassed by his dedication, commitment and willingness to roll up his sleeves and do the work during long hours of negotiation and fine draftsmanship. In all of these tasks he was generous with his time and energy and never insisted on claiming credit for his contributions, even though credit was always certainly due.

Throughout my tenure as Special Rapporteur I felt I was on the right track every time I heard Nigel’s comments on our initiatives. Needless to say, I sought his comments frequently and always found them frank and honest to a fault, and invariably constructive and encouraging.

I am also indebted to Nigel on other areas of international human rights law beyond torture and cruel, inhuman and degrading treatment or punishment. Very early on he inquired into the field that we now call transitional justice, by finding in treaties and custom room for an affirmative obligation to investigate, prosecute and punish certain egregious crimes, while never failing to see the important political, ethical and legal ramifications of that duty of States, or the daunting difficulties posed by it to societies emerging from dictatorship or conflict.

As we express our condolences to Lynn and to Nigel’s many friends and colleagues, we also thank him very deeply for his many contributions.

We will be better defenders of human rights if we pledge each day to try to be a little more like Nigel.
Poem by George Orwell

Oh brush them up and down.
Night and morning, my brother,
Are their bloody shine?
Oh! How they shine.

Brush their teeth right up and down.
All the folk in London town
Oh! Brush them up and down.
Brush your teeth up and down, brother.

Poem from Burma