

“Behind This Mortal Bone”: The (In)Effectiveness of Torture

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*No Rack can torture me
My Soul—at Liberty
Behind this mortal Bone I have to have
There knits a bolder One*

*Captivity is Consciousness,
So’s Liberty.¹*

This Essay addresses the theoretical debate on torture in an empirical way. It urges that as part of our evaluation of the merits of torture, we take a shrewd look at the quality of information brutal interrogations produce. The Essay identifies widespread belief in what the author identifies as the “torture myth”—the idea that torture is the most effective interrogation practice. In reality, in addition to its oft-acknowledged moral and legal problems, the use of torture carries with it a host of practical problems which seriously blunt its effectiveness. This Essay demonstrates that contrary to the myth, torture and the closely related practice, torture “lite” do not always produce the desired information and, in the cases in which it does, these practices may not produce it in a timely fashion. In the end, the Essay concludes, any marginal benefit the practice offers is low because traditional techniques of interrogation may be as good, and possibly even better at producing valuable intelligence.

INTRODUCTION

Consider the following two scenarios. In the first, a U.S. counterterrorism agent faces the impending release of a terrorist suspected of a heinous crime before the suspect has been interrogated. In order to exempt his agency from liability for his actions, the agent resigns from his job and then undertakes his own private interrogation in a parked car outside his former office. He expertly breaks the suspect’s handcuffed wrists, which has the intended effect—the suspect surrenders crucial, lifesaving information after being tortured.

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1. EMILY DICKINSON, COMPLETE POEMS OF EMILY DICKINSON 304 (1955).

In the second scenario, a young Canadian on his way home from a family vacation changes planes in New York. During the layover, he is seized by U.S. government agents, held in custody, and questioned about his suspected ties to terrorist organizations. After several days, plainclothes agents place him in handcuffs and leg irons and put him on an airplane. After making several stops in the United States, the plane eventually lands in Amman, Jordan, and the Canadian is driven over the border into Syria. There he is handed to a group of government agents who whip him repeatedly with two-inch electrical cables. As in the first scenario, the torture elicits a confession. Although the Canadian confesses to everything his interrogators ask, it is later determined that he had no connection to any terrorists or terrorist organizations.

The first scenario is based on an episode from the third season of the hit television show, *24*.² After counter-terrorism unit (CTU) Agent Jack Bauer resigns from the CTU, he breaks the wrists of Jack Prado, a suspected terrorist who has been released with the help of a human rights organization.³ This scenario, in which a government agent tortures a terrorist and in doing so secures vital information, mirrors how many Americans, including many American legal scholars, have come to view circumstances under which American law enforcement officials might use torture and/or coercive methods of interrogation. Conventional wisdom is that such circumstances do indeed exist and thus, coercive behavior will be necessary. This is a misunderstanding of the circumstances in which torture and other coercive mechanisms are advocated and used. I call this misunderstanding the “torture myth.”

Recent public attention to torture practiced in the wake of 9/11 as well as the high profile allegations of its use in police interrogation rooms in the United States have brought public attention to the practice, even though torture has been widely used internationally for some time.⁴ This attention has also highlighted the prevalence—both in the United States and in the few countries which practice torture—of the torture myth. Three interrelated assumptions compose the myth. The first assumption is that torture is only used against individuals whom the government has clearly established have strong ties to terrorism—that is, when we have good reason to believe that those we are torturing are either terrorists or have some connection to terrorism. The second assumption is that, those who believe the myth assume that the information possessed by those who are being tortured is valuable. In other words, if the detainee being tortured confesses, lives will be saved or future attacks will be averted. Finally, the third assumption underlying the myth is that physical pressure is highly effective; if you torture the terrorists, they will give up the goods. The questionable moral and legal status of torture makes our reliance on the myth essential: it is the way such troubling behavior may be justified. Thus, we cheer when CTU Agent Bauer acquires the information. His torture of the suspect has been legitimized.

2. Adam Green, *Normalizing Torture, One Rollicking Hour at a Time*, N.Y. TIMES, May 22, 2005, at B34.

3. Though I have not discussed domestic torture significantly in this Essay, it has, despite substantial constitutional prohibitions, been practiced here in the United States. *See, e.g.*, Abdou M. Pallasch & Frank Main, *Public to See Report on Cop Torture Allegations*, CHI. SUN TIMES, May 20, 2006, at 05 (describing four-year report on allegations that members of the Chicago Police Department tortured suspects to secure confessions in the 1970s and 1980s).

4. *See* AMNESTY INTERNATIONAL REPORT (1996), <http://www.amnesty.org/ailib/aireport/ar96/index.html> (documenting the torture of individuals in 114 countries including the Federal Republic of Yugoslavia, Indonesia, East Timor, Iran, Mexico, and Sudan).

The second scenario—based on experiences of Canadian citizen Maher Arar—adds a much-needed element of realism to the myth that I argue we have created to legitimize torture. This account and those of others like it directly contradict the assumptions underlying the torture myth. In September 2002, Arar, a Canadian engineer, was returning home from a family vacation. While changing planes at Kennedy Airport, he was arrested, held in custody, and interrogated for thirteen days. He was then flown to Jordan. From Jordan he was driven to Syria and handed over to interrogators who first questioned and later beat him.⁵ When Arar was not being beaten, he was imprisoned in a shallow, windowless, underground jail cell.⁶ Under this pressure Arar crumbled, confessing to the crimes of which his torturers accused him. A year later he was released. No charges were filed against him.⁷

All of this happened because Arar's name had been placed on a terrorist watch list. Like many other detainees in the war on terror, there was no actual evidence linking him to terrorist activities.⁸ So Arar's experience belies the first portion of the myth. The myth states that all who are tortured are terrorists. Unfortunately, Arar and scores of other detainees who report having been tortured were simply not terrorists, nor was there any credible information linking them to terrorist activities before their interrogation.

As far as the effectiveness of the torture, Arar's experience is directly at odds with the myth in this way as well. While the torture elicited a confession, it did not provide any information that could save lives or otherwise help American intelligence. The torture myth not only presumes that information will be elicited, but also makes strong claims regarding the quality of the information. Those who believe in the myth also believe, by definition, that torture is an effective interrogation practice. Torture and behavior approaching torture are justifiable, in the eyes of their defenders, because these brutal means serve the noble ends of saving lives.⁹

It is this central part of the torture myth—the relative effectiveness of torture and other coercive interrogation practices—with which this Essay grapples. Though torture can have many uses and may be used by state and non-state actors alike, in this Essay I focus on the use of torture and other coercive interrogation methods by state actors in just one context—interrogation—solely for the purpose of eliciting intelligence information. In zeroing in on the effectiveness of torture in this context, I ultimately suggest that interrogators should be setting their sights on acquiring reliable information. In other words, they should start to place value on the quality of the

5. When he was told that he would be taken to Syria, Arar panicked. Arar's family had emigrated from Syria when he was thirteen and he'd been told of its reputation for torture. Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106–23.

6. *Id.*

7. *Id.* Arar's story is similar to that of Khaled el-Masri, a German citizen, who was picked up by the CIA, drugged, and flown to Afghanistan where he was tortured. When the CIA realized they had the wrong man, they abandoned him in Albania. See David Kay & Michael German, *Abusing the Secrets Shield*, WASH. POST, June 28, 2007, at A17.

8. The contention has been made that many former detainees in Afghanistan were simply cases of mistaken identity. They were “simply the wrong guys: a farmer, a taxi driver and all his passengers; people with absolutely no connection with the Taliban or terrorism, who actually abhorred or fought against them.” DAVID ROSE, GUANTANAMO 36 (2004).

9. Alan Dershowitz, *Tortured Reasoning*, in TORTURE 266, 277–80 (Sandy Levinson ed., 2004).

information received as a result of interrogation, rather than the mere fact that a confession was rendered.

In Part I of this Essay, I explore what we mean by torture, addressing various gradations of torture and other coercive interrogation practices. I identify a range of permissible and impermissible coercive techniques being debated. In Part II, I provide examples of torture and the case for its use made by defenders. Part III assesses the evidence regarding the effectiveness of torture and coercive interrogation methods that I have identified. If (and I am not suggesting that it is) this is a situation where the ends justify savage means, I argue that the defenders of torture have not made a good case for its use. In fact, the scant evidence regarding the effectiveness of torture and other impermissibly coercive interrogation methods suggests otherwise. This Essay concludes with the exhortation that to increase the amount of reliable information, interrogators should turn their attention to less costly interrogation methods which have proven effective in the past.

I. WHAT DO WE MEAN WHEN WE SAY “TORTURE”?

A. Hierarchy of Coercive Interrogation Practices

To evaluate its effectiveness, we must first define what we mean by torture. We often throw about the term “torture” in popular discourse.¹⁰ Though there is a modicum of agreement on examples of torture that include interrogation techniques of extreme brutality like the rack,¹¹ beyond that there is little agreement on what constitutes torture.¹² Human rights organizations, for example, tend to have broader definitions of what constitutes torture than those defending government interrogators.¹³

10. See, e.g., *Designer Prices Go Sky-High*, TELEGRAPH, Nov. 1, 2006, <http://www.telegraph.co.uk/fashion/main.jhtml;jsessionid=G5XHQTLTHHUTFQFIQMFSFF4AVCBQ0IV0?xml=/fashion/2006/01/11/efexp11.xml>. This essay on the 2006 collection from the U.K.’s *Telegraph* notes rather casually, “Sometimes, when bored at work, we torture our fashion editor, Clare Coulson, by pulling her pigtails . . . , hiding her Paddington handbag, then making her explain how the economics of the fashion world breakdown.” *Id.*

11. The rack, the most common medieval torture device, is the paradigm of the excruciating pain that torture may inflict. First used in England in the reign of Henry VI, the rack was a rectangular oak frame raised approximately three feet off the ground. The victim was placed under it on his back, with his wrists and ankles tied to rollers at the ends of the frame. Levers working in opposite directions pulled the victim’s body level with the frame. If the prisoner did not surrender the required information during his interrogation, the levers were moved and the subject’s joints loosened, and sometimes dislocated. L.A. PARRY, *THE HISTORY OF TORTURE IN ENGLAND 76–77* (1975). See generally JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* 15 (1977).

12. E.g., GAIL H. MILLER, *DEFINING TORTURE* 1 (2005).

13. See Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 215 (2003). Organizations’ broad conceptions of torture most likely stem from the fact that international treaties, such as the United Nations Convention Against Torture (CAT), have very expansive definitions of what constitutes torture.

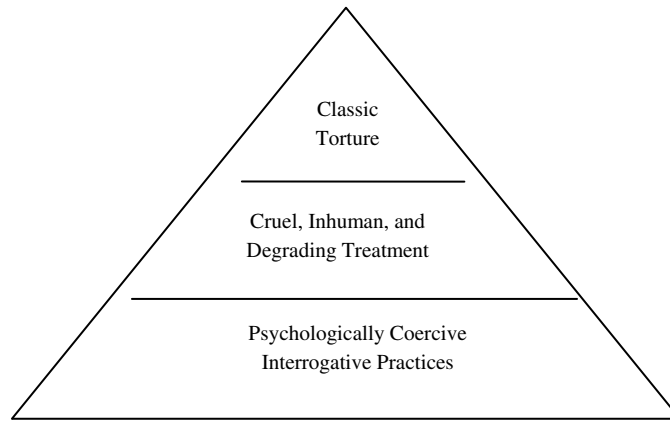


Figure 1. Coercive Interrogation Practices

In my analysis of the law of torture and scholarly discussions of repressive interrogation methods, I discovered that rather than one single universal practice, there is a hierarchical arrangement of coercive practices. To capture the multiple behaviors used by those conducting interrogation, any of which may casually be referred to as torture, I created a pyramid of coercive interrogation practices (see Figure 1, above). This is not a “torture” pyramid, since most scholars and laypersons would probably agree that not all of these practices amount to “torture.” The pyramid depicted here is arranged in a way to represent both the frequency with which practices are used and their severity—that is, how much pain the procedures cause. Thus, practices become less brutal and more common as one travels toward the pyramid’s base.

At the top of the pyramid is “classic torture,” the least common practice (at least in Western industrialized nations). Classic torture, prohibited under international law¹⁴

14. Under international law, the most commonly referred to prohibition for torture is Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51/Annex (Dec. 10, 1984), (*entered into force* June 26, 1987) [hereinafter *Convention on Torture*]. Other prohibitions of torture are located in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 171 (*entered into force* Mar. 23, 1976). Torture of prisoners of war and others detained during wartime is prohibited by the third Geneva Convention protecting prisoners of war and the fourth Geneva Convention, which protects civilians during wartime. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/811 (Dec. 10, 1948) (establishing in Article 5 a universal right to be free from torture or cruel, inhuman, or degrading treatment or punishment). The prohibition on torture under customary international law is *jus cogens*—a norm of international law accepted throughout the international community

and U.S. law,¹⁵ inflicts severe pain or suffering on the suspect.¹⁶ To fall into this first level, the behavior may either be directed at affecting the detainee's physical body or psyche but must be severe in intensity and/or duration. Physical behavior of this type would include beatings that break bones, whipping, burning, electric shock, and violent shaking of the suspect. Because it involves detainees in custody, classic torture may also involve acute limitations on food or sleep and even sensory deprivation or extreme discomfort, such as that caused by forcing the detainee to occupy a physically uncomfortable position for a prolonged period of time.

Located directly below classic torture is cruel, inhuman, and degrading treatment. Cruel, inhuman, and degrading treatment is a category that has legal meaning grounded in international law. Like classic torture, it is prohibited by international law.¹⁷ Cruel, inhuman, and degrading treatment amounts to behavior that, while similar to torture, lacks its severity. Cruel, inhuman, and degrading treatment might include beatings in which detainees sustain fewer injuries, beatings that are not repeated, or beatings that do not last for a long time. I would include in this category behavior that some distinguish from classic torture by calling it torture "lite,"¹⁸ which involves behaviors that apply "moderate physical pressure" and do not cause lasting physical damage.¹⁹

Psychologically coercive interrogation practices occupy the bottom level of the pyramid. Behavior in this category is not severe, cruel, inhuman, or degrading. Widely practiced in U.S. police departments,²⁰ advocated by top interrogation manuals,²¹ and used by experienced interrogators the world over, techniques in this group do not degrade the detainee. Interrogations in this category may involve befriending the detainee to gain his/her trust, appealing to the detainee's conscience, using praise or flattery, identifying contradictions in the detainee's story, trickery and other deception, misleading the detainee with elaborate lies or the use of stool pigeons, or placing listening devices in detainees' cells.

of states. LAURI HANNIKANIEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 509, 718 (1988).

15. There are a variety of U.S. laws which prohibit coercive interrogation techniques. *See, e.g.*, 18 U.S.C. §§ 2340(1), 2340A, 3261–3267 (2000); 10 U.S.C. §§ 893, 918, 919, 924, 925, 928, 933 (2000). The U.S. Constitution, it has also been argued, prohibits torture. For two discussions of the U.S. constitutional constraints on torture, see Seth F. Kreimer, *Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 283 (2003) and Ceilia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 666–680 (2004).

16. *See, e.g.*, Convention on Torture, *supra* note 14; Emmanuel Gross, *Terrorism and Law: Democracy in the War Against Terrorism—the Israeli Experience*, 35 LOY. L.A. L. REV. 1161, 1169 (2002); John T. Parry, *What is Torture, Are We Doing It, And What if We Are?*, 64 U. PITT. L. REV. 237, 238 (2003); Strauss, *supra* note 13, at 209–210.

17. *See, e.g.*, Convention on Torture, *supra* note 14.

18. *See* Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51–76.

19. *Id.* at 53.

20. *See, e.g.*, JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME (2002) (describing officers' interrogation practices in hate crime cases); Richard Leo, *Inside the Interrogation Room*, 86 J. OF CRIM. L. & CRIMINOLOGY 266 (1996) (describing police trickery).

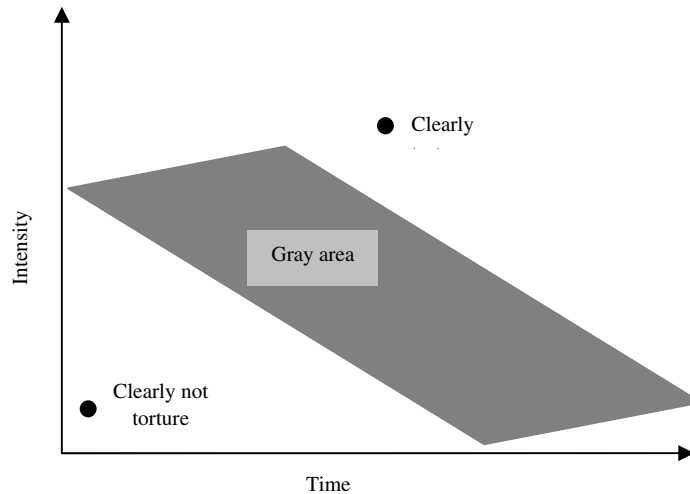
21. *See, e.g.*, KUBARK Counterintelligence Interrogation, <http://www.kimsoft.com/2000/kubark.htm>; CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA 479–83 (2004) (detailing non-coercive military interrogation approaches).

B. Torture vs. Cruel, Inhuman, and Degrading Treatment—A Distinction That Makes a Difference?

There is significant overlap between actual torture and the lesser category of cruel, inhuman, and degrading treatment, a situation which has led to much parsing of the distinction between the two practices. The close relationship between torture and cruel, inhuman, and degrading treatment is illustrated well by *Ireland v. United Kingdom*.²² In this case, the European Court of Human Rights was asked to evaluate whether members of the Irish Republican Army (IRA) detained by British security forces were tortured.²³ The interrogation techniques at issue included: 1) hooding at all times except during interrogation; 2) deprivation of sleep prior to interrogation; 3) holding the detainees prior to their interrogation in a room where there was a loud hissing sound; 4) wall-standing—that is, forcing detainees to stand against a wall for hours; and 5) subjecting detainees to reduced food and drink.²⁴ Previously, the European Commission of Human Rights had found that the use of these five techniques constituted only cruel, inhuman, and degrading treatment because they did not have the intensity and cruelty that characterizes torture.²⁵

The case of the IRA illustrates a general concern: it is difficult in general to create a hierarchy of forbidden practices because many factors are relevant to the assessment of whether a particular behavior constitutes torture. Is wall-standing torture? It could be, if detainees are forced to stand all day. Does hooding constitute torture? It could be, if detainees remain hooded for long periods of time. Is a beating torture? Possibly, depending on how long it lasts and its severity.

Figure 2. Coercion Continuum



22. App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1978).

23. *Id.*

24. *Id.*

25. *Id.*; see also *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260 (1996) (explaining that “Palestinian hanging,” in which the detainee was stripped naked and hung by his wrists causing temporary paralysis, demonstrated severity and cruelty consistent with torture).

Given that circumstances in which the practices take place matters so much, it might be better to characterize coercive interrogation practices as a continuum characterized by degrees of intensity and duration (see Figure 2, above). From the diagram we can see in the top right quadrant behavior that is clearly torture. These are interrogation practices that last for a long time and are characterized by great physical or emotional intensity. Hanging a prisoner by his wrists until his arms dislocate is clearly torture.²⁶ At the other extreme, close to the center axis, we have activities with both low intensity and short duration. Requiring a suspect to kneel on pebbles for an hour would be an example in this category. Such behavior, while distasteful, is clearly not torture. Between the two categories, behavior that is clearly not torture and behavior that is clearly torture occupies a no man's land composed of tiny distinctions—one thousand shades of gray. Practices that have medium intensity and occupy a few hours are difficult to classify as falling into either category. Languishing in this gray area, sandwiched between actions that are classic torture and those that are clearly not torture, is cruel, inhuman, and degrading treatment. As the discussion below details, this is the gray area in which courts and politicians are fighting.

II. ASSESSING EFFECTIVENESS: HOW WELL DOES TORTURE WORK “ON THE GROUND”?

A. Allegations of Torture

Both classic torture and cruel, inhuman, and degrading treatment are prohibited by a variety of national and international laws.²⁷ Despite the various international and domestic prohibitions against torture, the world learned in April 2004 that American military intelligence adopted a variety of coercive physical and psychological techniques designed to extract confessions from detainees in custody in Iraq. Public knowledge of American interrogation practices began with a CBS television broadcast of photographs of abuses at the Abu Ghraib prison in Iraq.²⁸ Later it was discovered that coercive interrogation techniques were also used against detainees at the American-run detention facilities in Guantanamo Bay, Cuba.²⁹

Shortly before the CBS program aired, a report was issued by the International Committee of the Red Cross (ICRC) providing more details about detainee abuse in Iraq. The Red Cross went to Iraq, and later to Cuba, as part of monitoring duties

26. See, e.g., JEAN AMÉRY, *AT THE MIND'S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES* 32 (1980) (describing the author's torture by the Nazis).

27. See, e.g., 18 U.S.C. §§ 2340 (1), 2340A (2000) (prohibiting acts “committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . on another person within his custody or control”); Convention on Torture, *supra* note 14; International Covenant on Civil and Political Rights, *supra* note 14 (providing “[n]o one shall be subjected to torture or cruel inhuman or degrading treatment or punishment”); Universal Declaration of Human Rights, *supra* note 14.

28. MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB AND THE WAR ON TERROR* xiii (2004).

29. See Eric Schmitt, *The Conflict in Iraq: Detainee Treatment; New Interrogation Rules Set for Detainees in Iraq*, N.Y. TIMES, Mar. 10, 2005, at A1.

assigned by the High Contracting Parties to the Geneva Convention.³⁰ In this role, the ICRC conducted private interviews with detainees held by Coalition Forces in Iraq between March and November of 2003.³¹ In February of 2004, the ICRC issued a report on the Coalition Force's treatment of prisoners of war and other detainees at several detention facilities in Iraq.

According to the ICRC report, those arrested in connection with suspected security offenses or deemed to have some intelligence value were most likely to be mistreated. Military intelligence officers subjected those being interrogated to a variety of coercive behaviors including: 1) physical assaults;³² 2) hooding (used both to disorient and to prevent the prisoner from breathing freely); 3) threats (of ill treatment, reprisals against family members, or imminent execution); 4) humiliation³³ and other acts of physical and psychological coercion that were in some cases equivalent to torture.³⁴ Often physical and psychological coercion were combined with acts such as exposure to loud noises or music while hooded, being forced to squat for prolonged periods of time, and prolonged exposure to the sun in temperatures that could reach 122 degrees Fahrenheit.³⁵ All of this was done in the name of securing information.

According to reports of detainees who had been released, the initial intake period before the interrogation was designed to "soften up" prisoners for what was to come. The description provided by one British detainee captured in Afghanistan, Tarek Dergoul, was typical.³⁶

When I arrived, with the bag over my head, I was stripped naked and taken to a big room with fifteen or twenty MPs [military police]. They started taking photos,

30. See *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during the Arrest, Internment and Interrogation*, in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 283–404 (Karen J. Greenberg & Joshua L. Dretel eds., 2005) [hereinafter *ICRC Report*].

31. *Id.* at 384.

32. The ICRC Report describes beating with hard objects including pistols and rifles, slapping, punching, and kicking with knees or feet. *Id.* at 392.

33. Acts of humiliation included being forced to stand naked against a wall, being paraded naked in front of other detainees, or being forced to wear women's underwear over the head while guards laughed. *Id.*

34. *Id.* at 385.

35. *Id.* at 393.

36. The Council of Europe investigated detainee treatment and issued a report, based on testimony from individuals, including former and current detainees, human rights advocates, and those who worked in the establishment or operation of CIA prisons. The report describes detainees being taken to their cells by individuals wearing black masks covering their faces. The detainees' clothes were torn off. Many were kept naked for several weeks. Detainees were only given a bucket to urinate into. Detainees underwent three months of solitary confinement and extreme sensory deprivation. COUNCIL OF EUROPE, *SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES: SECOND REPORT* (2007), http://media.washingtonpost.com/wp-srv/politics/ssi/full_report_marty_060807.pdf. Other descriptions of detainees are detailed in ACLU, *ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD* 36, 37 (2006), available at http://www.aclu.org/safefree/torture/torture_report.pdf.

and then they did a full cavity search. As they were doing that they were taking close-ups, concentrating on my private parts.³⁷

Compared to some of the detainees in the neighboring wire cages, Dergoul was lucky. Other prisoners near him were forced to squat for hours. If they lost their balance, they were beaten with guns or baseball bats until they lost consciousness.³⁸

When the time for his interrogation came, Dergoul's interrogators repeatedly accused him of having fought for Al Qaeda in Tora Bora. Seemingly deaf to his insistence that he had no knowledge of battles or other significant intelligence, they interrogated him on more than twenty separate occasions. Eventually, after being told his family's assets would be seized unless he confessed, he told them he had been at a battle at Tora Bora. Prior to his confession Dergoul told a reporter, "I was in extreme pain from the frostbite and other injuries, and I was so weak I could barely stand. I was freezing cold and shaking and shivering like a washing machine. Finally, I'd agreed I'd been at Tora Bora"³⁹

In fall of 2005, a year after the ICRC Report was released, further allegations of torture came to light after a Human Rights Watch report detailed the testimony of officers from the Army's 82nd Airborne Division describing beating and other prisoner abuse in U.S. bases in Afghanistan and Iraq. The beating and other actions, according to the report, were specifically aimed at getting detainees to talk. While similar to earlier reports of abuses, the allegations by members of the 82nd Airborne were notable in at least one significant respect. In addition to describing routine abuse of detainees, the 2005 allegations also outlined the patent inability of one soldier, Captain Ian Fishback, to get answers from his superiors regarding the parameters of appropriate behavior toward detainees.⁴⁰

B. Defending Torture "Lite"

Soon after the United States began strikes against Al Qaeda terrorist training camps in October of 2001, the United States began to prepare to interrogate terrorists according to new rules of engagement. A series of memoranda and military orders created the legal framework for new, more coercive methods of interrogation. President Bush's Military Order of November 13, 2001 indicated that because of the nature of international terrorism, alleged Al Qaeda and other terrorists would be tried by military tribunals that would not be subject to the same rules of law recognized in U.S. criminal courts.⁴¹ In December 2001, Deputy Assistant Attorney General John C. Yoo advised the Department of Defense that U.S. Federal Courts lacked jurisdiction to hear habeas corpus petitions of prisoners held in Guantanamo Bay, Cuba.⁴² A week later, in January 2002, Yoo argued that the Geneva Conventions did not apply to

37. ROSE, *supra* note 8, at 36.

38. *Id.* at 36–37.

39. *Id.*

40. Josh White, *New Reports Surface About Detainee Abuse*, WASH. POST, Sept. 24, 2005, at A01.

41. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,831–57,836 (Nov. 16, 2001).

42. Office of Legal Counsel, U.S. Dep't of Justice, *Possible Habeas Jurisdiction of Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), in *THE TORTURE PAPERS*, *supra* note 30, at 29.

members of Al Qaeda and the Taliban.⁴³ A memo from the Department of Justice Office of Legal Counsel to Alberto Gonzales, Counsel to the President, in August of 2002 indicated the United States was bound to observe the prohibitions on torture under the United Nations Convention Against Torture (CAT) and the War Powers Act, but only as long as they were in accord with the Fifth, Eighth, and Fourteenth Amendments to the Constitution.⁴⁴

Statements to the press, internal memoranda, and executive orders made clear that there were two separate reasons for departures from contemporary understandings of U.S. obligations under customary international law. The first justification stemmed from the nature of the threat the country faced. In his first executive order expanding the power of the Executive Office with respect to detainees, President Bush cited the danger to the United States and the nature of international terrorism. The assumption inherent in this reasoning is that the specter of horrible ends justifies extraordinary means.

Having fully considered the magnitude of the potential deaths, injuries and property destruction that would result from potential acts of terrorism against the United States and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that the issuance of this order is necessary to meet the emergency.⁴⁵

Memoranda exchanged within the Bush Administration on the decision to use coercive methods of interrogation are replete with discussions of the danger to the United States posed by Al Qaeda. The above cited Office of Legal Counsel memo to Gonzalez advised that interrogation of captured Al Qaeda operatives could provide information concerning the nature of the organization's plans and the identities of personnel which could prove invaluable in preventing further attacks on the United States.⁴⁶

A second reason for the departure, related to the first and also expressed in the memo to Gonzalez cited above, was that such strategies were necessary in this "new" war on terrorism.⁴⁷ In at least one case, the argument for coercive interrogation methods was made from the field. In a Defense Department memo written for the Joint Chiefs of Staff in 2002, Army General James T. Hill indicated that the need for more coercive techniques exists because detainees had "tenaciously resisted" interrogation methods in use at the time.⁴⁸

43. Office of Legal Counsel, U.S. Dep't of Justice, *Application of Treaties and Laws to Al Qaeda and Taliban Detainees* (Jan. 9, 2002), in THE TORTURE PAPERS, *supra* note 30, at 79. For a critique of Yoo's legal analysis under international law, see Jose Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006).

44. *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (Apr. 4, 2003), in THE TORTURE PAPERS, *supra* note 30, at 285-359.

45. Military Order of Nov. 13, 2001, *supra* note 41.

46. Office of Legal Counsel, *supra* note 43, at 201.

47. In calling it a "new" war on terrorism, one assumes that the Office of Legal Counsel may be referring to the nature of terrorist organizations. However, this is not entirely clear.

48. James T. Hill, Memorandum for the Joint Chiefs of Staff (Oct. 25, 2002), in THE TORTURE PAPERS, *supra* note 30, at 201.

The requested techniques fell into two groups. Category II techniques included forcing detainees to stand in stress positions, the use of falsified documents, subjecting detainees to isolation, deprivation of light, removal of detainees' clothing, the use of twenty-hour interrogations, the use of dogs to induce stress in fearful detainees, and hooding.⁴⁹ Category III techniques included grabbing, poking, light pushing, and the use of scenarios designed to convince the detainee that death or severe painful consequences were imminent. While not classic torture, many of the practices in Category II and Category III would be classified as cruel, inhuman, or degrading treatment under the CAT. The best explanation for the Administration's use of such techniques is that it believed in its effectiveness. This is supported by the Administration's justification, as cited in the memo. The use of such techniques, the memo argued, would "maximize the value of our intelligence collection mission."⁵⁰ The fact that the use of such techniques seems to clearly violate the CAT was not a problem for the Administration. In a separate memo to Secretary of Defense Donald Rumsfeld, the general counsel of the Department of Defense asserted that all techniques listed above were legally available.⁵¹

A clear assumption behind the idea that the level of threat and the nature of the conflict demand a heightened level of coercion in interrogations is that more coercive interrogations are more effective at eliciting intelligence. In other words, violent means are justified by the payoff—valuable lifesaving information. Had there been hard evidence of this, it would have strongly bolstered the Administration's case for changing interrogation standards. Despite such a need for clarity, the recently declassified Bush Administration documents are somewhat vague on the extent to which using more coercive behavior during interrogations yields lifesaving or even better intelligence information.⁵²

Like other documents exchanged by the Bush Administration, General Hill's memo provides no evidence that the use of more coercive measures would yield greater intelligence.⁵³ It does not appear that the support for coercive methods is based on any knowledge that such mechanisms will be effective. What does it mean to be effective? One way of defining effective interrogation techniques is to identify them as those

49. Department of Defense, Joint Task Force 170, *Legal Brief on Proposed Counter-Resistance Strategies* (Oct. 11, 2002), in *THE TORTURE PAPERS*, *supra* note 30, at 229.

50. Department of Defense, United States Southern Command, *Counter-Resistance Techniques* (Oct. 25, 2002), in *THE TORTURE PAPERS*, *supra* note 30, at 223. In the end, only interrogation techniques in Categories I and II and the fourth technique in Category III (grabbing, poking in the chest with the finger, and light pushing) were approved by Secretary of Defense Donald Rumsfeld. His order approving the blanket use of such techniques was rescinded in January 2003.

51. Department of Defense, *supra* note 49.

52. An example of this is General Hill's memo asking for permission to use Category II and Category III interrogation techniques. Though some suspects were able to resist, (note that this is most likely an assumption, as suspects may not have disclosed information because they did not have any to disclose), he also indicates that less coercive measures have yielded critical intelligence support. Hill, *supra* note 48.

53. *Id.*; see also Office of Legal Counsel, U.S. Department of Justice, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A* (Aug. 1, 2002), in *THE TORTURE PAPERS*, *supra* note 30, at 201 (describing hypothetically the value of interrogating suspected Al Qaeda terrorists).

practices which are able to secure reliable intelligence or a confession. The memo does not supply any evidence to suggest Category II and Category III measures will work better than methods that had been used previously. Rather, the rationale for their use appears to have been that they had not yet been tried.

Even after the exposé of detainee abuse by U.S. hands at Abu Ghraib, the Bush Administration maintained its support for physically coercive interrogation mechanisms. In the wake of the release of the prisoner abuse photos, Senator John McCain sponsored an amendment which would prevent the military and CIA from using, “cruel, inhuman, or degrading treatment,” against detainees.⁵⁴ In its initial response to the McCain Amendment, the Bush Administration asked for a presidential waiver allowing such treatment to be used in particular circumstances. When the Bush Administration did not receive such a waiver in the final bill, President Bush issued a signing statement indicating that he would interpret the restrictions in line with his duties as commander-in-chief. Some understood this to mean that he would authorize the use of cruel, inhuman, and degrading treatment in circumstances where he felt such behavior appropriate.⁵⁵ The Administration did not want the restrictions to apply outside the United States against agents involved in non-Department of Defense clandestine counterterrorism operations, such as those who work for the CIA. Senators who defended the Bush Administration’s opposition to the measures insisted that the guidelines would aid terrorists “because extracting information requires fear of the unknown.”⁵⁶

Another prominent defender of cruel, inhuman, or degrading treatment—torture “lite”—Alan Dershowitz suggests that sterilized needles be inserted under the fingernails of suspected terrorists, producing unbearable pain, to secure information from them.⁵⁷ Dershowitz’s support for government use of nonlethal torture is premised in part on the effectiveness of torture as an interrogation technique. “The tragic reality is that torture sometimes works, much though many people wish it did not. There are numerous state instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians.”⁵⁸ Dershowitz approves of

54. See Jordan J. Paust, *Above the Law: Unlawful Executive Authorization Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345 (2007) (discussing the McCain Amendment, its passage, and the most limited form it took when included in legislation).

55. See Charlie Savage, *Three Senators Blast Bush Bid to Bypass Torture Ban*, BOSTON GLOBE, Jan. 5, 2006, at A3. The White House’s view was subjected to challenge. In *Hamdan v. Rumsfeld*, the Supreme Court held that Common Article 3, which bans cruel treatment and torture, governs U.S. treatment of Al Qaeda detainees. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). In response, on July 20, 2007, President Bush signed an executive order affirming his commitment to the use of cruel, inhuman, and degrading treatment in particular circumstances. The executive order interpreted that Common Article 3 of the Geneva Conventions did not apply to members of the Taliban or Al Qaeda. The executive order also determined that current CIA interrogation procedures did indeed comply with U.S. obligations under Common Article 3. See *Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency*, July 20, 2007, <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>.

56. Audrey Hudson, *Senators Defend Bush on Torture Ban*, WASH. TIMES, Nov. 7, 2005, at A03.

57. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 144 (2002).

58. *Id.* at 137.

the use of torture “lite” in idealized “ticking time bomb” scenarios. The scenario involves a captured rebel leader who is presumed to know the location of a number of bombs hidden in apartment buildings across the city, set to go off within the next twenty-four hours.⁵⁹ Dershowitz accepts nonlethal torture in such scenarios because the benefits to society (saving innocent lives) outweigh the cost to the individual being tortured (momentary pain).

Dershowitz’s approach, built on the hypothetical of the ticking time bomb has several problems.⁶⁰ Two of these directly relate to the issue of effectiveness. The first has to do with the gap in our knowledge with respect to potential terrorist threats. In the hypothetical, we have the “right man.”⁶¹ In real life, however, we often do not know whether the persons we are interrogating hold valuable intelligence. As Elaine Scarry has noted, the use of nonlethal torture in response to the ticking time bomb scenario implies that we have the ability to know that the person in front of us holds crucial evidence regarding the bomb’s whereabouts.⁶² More than 5000 foreign nationals were detained between September 11, 2001, and the time the photos at Abu Ghraib were publicized. Four years after the detention, only three were charged, and two of those were acquitted.⁶³ Such a low hit rate, three charges out of more than 5000 detainees, certainly suggested that the Allied Forces were just guessing whether the detainees possessed intelligence with the lifesaving potential that Dershowitz imagines. A hit rate of 0.06% seems awfully low to justify a practice that has the moral and ethical problems of torture “lite.”

Even if we did have knowledge that suspects have critical intelligence, one of the very examples that Dershowitz uses to illustrate the effectiveness of torture does not even fit his own explanation for when torture is justified. The ticking time bomb scenario is distinctly different from the example that Dershowitz offers to illustrate the effectiveness of torture. He recounts a case from 1995 in which Philippine authorities spent sixty-seven days brutally beating a terrorist. After “successfully employing” these procedures, the terrorist and the valuable information (Dershowitz doesn’t disclose what that information was) were turned over to U.S. authorities. Though torture in this case was successful, it was by no means speedy—certainly not quick enough to defuse any ticking time bombs. One can only wonder whether two months’ worth of clever psychological interrogation might not have unearthed the same information.

III. ASSESSING THE EFFECTIVENESS OF COERCIVE MEASURES

Concerns about security and adverse public reactions undoubtedly inhibit the government’s efforts to recount anecdotes regarding the use of torture and less severe coercive interrogation practices, making any evaluation of effectiveness exceedingly difficult. The scant empirical evidence that can be uncovered regarding whether torture is good at eliciting information suggests that coercive mechanisms may not be

59. *Id.* at 140.

60. For other problems with Dershowitz’s reasoning, see Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE*, *supra* note 9, at 281–90.

61. Henry Shue, *Torture in Dreamland*, 77 *CASE W. RES. J. INT’L L.* 231, 233 (2006).

62. Scarry, *supra* note 60, at 284.

63. *Id.*

especially effective interrogation tools. The data that does exist regarding the effectiveness of torture can be divided into three categories, listed here in order of reliability: 1) empirical studies which evaluate the value of the information gained from individuals subjected to different types of interrogation methods; 2) testimony from current and former interrogators regarding methods that work and methods which they have found to be ineffective; and 3) anecdotes about the effectiveness of torture in particular cases. Each of these areas will be evaluated in turn.

A. Anecdotes Detailing When Torture Has Worked

How do torture and other coercive mechanisms stack up given evidence from each of these categories? Moving from least reliable to most, anecdotes concerning the effectiveness of physical coercion are readily available but constitute the weakest form of evidence. This may be in part because anecdotes exist supporting multiple perspectives. In fact, the anecdotes seem to fall into three categories. There are cases that suggest torture can yield valuable information. The 1995 case from the Philippines recounted above is an oft-cited example.⁶⁴ Cases in which torture is said to have worked on a large scale include Northern Ireland and Algeria, but even in those examples the evidence is mixed.⁶⁵

The War on Terror has provided a variety of vague examples to support the claim that torture works. For instance, the Senate Select Committee on Intelligence, without providing specific examples, suggests that individuals detained by the CIA after the September 11th attacks have “provided valuable information that has led to the identification of terrorists and the disruption of terror plots.”⁶⁶ The most straightforward evidence was the evidence gained from Khalid Sheikh Mohammed—the Al Qaeda leader who is said to have masterminded the September 11th attacks. Mohammed was captured and interrogated as part of a secret CIA program allowing terrorist suspects to be detained at “black sites”—secret prisons outside the U.S. Mohammed was taken to a location in Poland where he was kept naked, shackled, and in a prolonged state of sensory deprivation.⁶⁷ When signing the Military Commissions

64. See also Jean M. Arrigo, *A Utilitarian Argument Against Torture Interrogation of Terrorists*, 10 SCI. & ENG'G ETHICS 547 (2004) (presenting other single-case anecdotes).

65. During the War for Algerian Independence, General Jacques Massu is said to have won the Battle of Algiers using torture. Many agree that the manner of winning the Battle of Algiers led ultimately to France's defeat. See MALCOLM D. EVANS & ROD MORGAN, PREVENTING TORTURE 30 (1998). In response to allegations that IRA members were being tortured, the British Home Secretary appointed a committee which inquired into the treatment of those detained by the British in Northern Ireland in the 1970s. The committee's report issued in the midst of the crisis found the techniques used, including wall-standing and hooding, to be effective. Later reports viewed such techniques as “counterproductive.” *Id.* at 38–40. See generally JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 112 (2000).

66. U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT 110–75 (May 31, 2007), <http://intelligence.senate.gov/11075.pdf>.

67. Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer.

Act, President Bush claimed that the interrogation techniques used against Mohammed yielded information that had prevented attacks on the country.⁶⁸

The torturer's dream is an individual who, when confronted with the slightest mention of pain, immediately confesses. At the other end of the spectrum are individuals who, like the subject of the Emily Dickinson poem at the beginning of this Essay, will not confess despite intense pain.⁶⁹ This is an important issue because it seems clear that advocates of torture "lite" expect resistance from detainees. That is, after all, why they advocate coercive mechanisms.

There is some anecdotal evidence that select individuals are able to resist torture. Prominent examples of groups of individuals who were alleged to have been able to resist torture include those involved in the late war plot to assassinate Hitler and also American POWs tortured by the North Vietnamese.⁷⁰ It is unclear precisely what percentage of suspects are able to control their reactions to pain, but one researcher examining court records for 625 cases of juridical torture in France from the 1500s through the mid-1700s, showed that "in 67 [percent] to 95 [percent] of cases the accused did not confess—on the rack, under repeated drowning, crushing of joints, and the like."⁷¹

The third group of anecdotes, typified by the torture of Arar, the Canadian detainee mentioned at the beginning of this Essay, reported false positives, those individuals who confess to things they did not or could not have done. This occurs because physical coercion tests the prisoner's ability to withstand pain rather than the truthfulness of his assertion.⁷² When faced with torture, innocent individuals may yield to "the pain and torment and confess things they never did."⁷³ Since false confessions of this sort tend to be induced by the coerciveness of the interrogation, torture frequently leads to an increased percentage of false positives. Many experienced interrogators eschew torture for just this reason.⁷⁴ The ability to produce more false confessions obviously does not demonstrate effectiveness.

B. Interrogators' Experience

The second category, interrogators' experience, constitutes another type of anecdotal evidence. This evidence is based on interviews conducted by journalists and researchers. The interview subjects were experienced interrogators who operated in a variety of different contexts. The results: classic physical torture was not interrogators' most preferred method for gaining evidence. Joseph Lelyveld, who interviewed interrogators ranging from the former chief interrogator of the Israeli security agency,

68. *President Bush Signs Military Commissions Act of 2006*, <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

69. There is evidence that there are some suspects who cannot be broken. *See, e.g.*, CONROY, *supra* note 65, at 113, 118 (describing Henri Alleg who was tortured by the French without giving up information and describing a suspect in Vietnam, who despite having been tortured by multiple interrogators, never cracked); Bowden, *supra* note 18, at 65.

70. *See* Arrigo, *supra* note 64, at 549–50.

71. *Id.* at 549.

72. LANGBEIN, *supra* note 11, at 9.

73. *Id.*

74. *See, e.g.*, CONROY, *supra* note 65, at 113.

Shin Bet, to retired FBI agents, found there to be little support for the efficacy of torture:

If I press my question about violence in these and other conversations, the most invariable answer, as if learned by rote in the same school, was that too much violence produced unreliable information because people will say anything, admit to anything, as a way of gaining surcease from unbearable pain. Torture, in other words, is a useful tool for gaining confessions when the facts are deemed not to matter.⁷⁵

Other commentators on the ground echoed sentiments expressed in Lelyveld's interviews. John Brennan, former CIA director George Tenet's chief-of-staff, indicated that much of the information that coercion produces is unreliable.⁷⁶ Researcher John Conroy came to a similar conclusion after speaking with Don Dzagulones, who both witnessed and participated in torture as an interrogator during the Vietnam War. Dzagulones reported that he could not recall a single incident in which torture had been effective.

If it happened, I'm certainly not aware of it. Like prisoner X comes in, you beat the living snot out of him. He tells you about a Viet Cong ambush that is going to happen tomorrow, you relay this information to the infantry guys, and a counter-ambush and the good guy wins and the bad guys loses all because you tortured a prisoner. Never happened. Not to my knowledge.⁷⁷

What about lower levels of torture—that is, when individuals are subjected to torture “lite”? Lelyveld's interviews suggested that torture “lite” was not especially effective either. He concluded, “The plain fact seems to be that, sooner or later, most forms of interrogation work with most prisoners who have been deprived of comrades, a reliable sense of time, or whether it's day or night, and any external reason for resistance.”⁷⁸

Lelyveld's conclusion that coercive mechanisms are not necessarily the most effective is bolstered by other interviews with interrogators. Former military officer Mark Bowden interviewed a series of legendary interrogators and similarly did not find evidence that torture is more effective than psychological mechanisms that were favored by many of the most successful interrogators.⁷⁹ The interrogation techniques often favored were intensely psychological, very theatrical, and aimed at keeping the prisoner off balance. For instance, according to interrogators and interrogation manuals, one useful technique involved staging a torture or beating session in the room

75. Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAG., June 12, 2005, at 40.

76. Mayer, *supra* note 67.

77. CONROY, *supra* note 65, at 113.

78. *Id.* at 43; *see also* CONROY, *supra* note 65, at 43–44 (commenting on the beatings, sensory deprivation, and other coercive techniques used against prisoners in Northern Ireland in the 1970s, one psychologist who studied interrogation techniques around the world for the British Ministry of Defense right after World War II said such methods were “blunt, medieval, and extremely inefficient”).

79. *See* Bowden, *supra* note 18, at 57. For an account of Nazi torture as a part of interrogation, *see* AMÉRY, *supra* note 26, at 21–39.

next to where the suspect was being interrogated.⁸⁰ A good interrogator, writes Bowden, is a deceiver.⁸¹

C. Studies Evaluating Effectiveness of All Methods

The most convincing evidence regarding effectiveness—studies comparing the effectiveness of torture and other coercive mechanisms vis-à-vis other types of mechanisms—is also the most elusive.⁸² In a study conducted by Nazi scientists, subjecting concentration camp inmates to pain, extremes of hot and cold, and other brutal behavior did not produce any reliable way of getting people to talk.⁸³ During the 1950s, U.S. researchers were concerned that the Chinese or the Soviets had discovered the secret to successful interrogation techniques and decided to investigate practices utilized by the socialist and communist regimes. Their research suggested neither state had found a magic bullet.⁸⁴ Between 1953 and 1966, the CIA created a research project code named Project MKULTRA, designed to investigate a variety of interrogation techniques including brainwashing and the use of drugs during interrogation. The agency contracted with research foundations and universities to compare various combinations of “straight interrogation, hypnosis, and drugs on subjects who denied allegations known to be true.”⁸⁵ The results of this research did not fare appreciably better than Nazi attempts to identify optimal interrogation tactics.⁸⁶ This research is not published, and in the mid-1980s the Supreme Court held that the identities of the researchers should not be revealed for security reasons.⁸⁷ Sensory deprivation and other types of drugs such as methamphetamines may prove more effective, but results vary, depending on the person.⁸⁸

It is unsurprising that there is so little contemporary information in this third category. Federal guidelines governing the treatment of human subjects almost certainly would prevent the gathering of empirical research comparing whether torture was more effective than less brutal means of gathering information.

Though there is little data from head-to-head comparisons of the tortured and those interrogated more humanely, a related form of data exists in the form of systematic studies of those who have been tortured. For example, in the late 1950s, Albert Biderman studied the effect of interrogation—coercive and otherwise—on Air Force servicemen who had been POWs during the Korean War.⁸⁹ Biderman’s results were

80. Bowden, *supra* note 18, at 65.

81. *Id.*

82. See Randy Borum, *Approaching the Truth: Behavioral Science Lessons on Educating Information from Human Sources*, in CENTER FOR STRATEGIC INTELLIGENCE RESEARCH, *EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART* 18 (2006), available at <http://www.fas.org/irp/dni/educing.pdf> [hereinafter *EDUCING INFORMATION*].

83. See Bowden, *supra* note 18, at 57.

84. See Robert A. Fein, *U.S. Experience and Research in Educating Information: A Brief History*, in *EDUCING INFORMATION*, *supra* note 82, at xi, xii.

85. Arrigo, *supra* note 64, at 551.

86. See *id.*

87. See *CIA v. Sims*, 471 U.S. 159 (1985).

88. Arrigo, *supra* note 64, at 558.

89. Albert D. Biderman, *Social-Psychological Needs and “Involuntary” Behavior as Illustrated by Compliance in Interrogation*, 23 *SOCIOMETRY* 120 (1958).

based on analyzing 220 transcripts of interviews conducted by the military after the servicemen were released, mailed questionnaires sent to a group of the POWs, and follow-up interviews with a selection of the group.⁹⁰ Biderman found that many of the POWs were subjected to various types of coercion—including violence and threats of death during interrogation. Nevertheless, his results reveal surprisingly that most forms of violence were less effective at eliciting information than non-violent psychological ploys.⁹¹

The paucity of empirical evidence regarding the effectiveness of torture contrasts sharply with that on the effectiveness of non-physical methods of interrogation. There is plenty of scholarship evaluating the most effective non-physical ways of interrogating suspects.⁹² Since torture and all other coercive interrogation methods are barred by U.S. law, police experts have developed interrogation techniques designed to transform interrogators who use them into human lie detectors and make them capable of extracting information from even the most intransigent suspects.⁹³ Research on interrogation in the human intelligence field, for instance, has identified the establishment of rapport as an important factor in non-coercive interrogations.⁹⁴

The extraordinary claims made by those who write interrogation manuals do not necessarily translate into the exceedingly high levels of effectiveness of which they brag. Though there is some evidence to suggest that professionals are better at detecting lies than members of the general public,⁹⁵ when officers are placed in situations similar to interrogation, their accuracy rate was around sixty-seven percent.⁹⁶ This is of course significantly higher than the level of chance but far lower than the eighty-five percent interrogation manuals predict. In addition, the problem of false confessions is not limited to those interrogations during which suspects are being tortured. Research has shown that false positive errors are most likely to occur when interrogators isolate the suspect in the interrogation room, when they confront him with evidence of the crime, or when they provide moral justification for having committed the crime.⁹⁷

90. *Id.* at 123.

91. *Id.* at 140–41.

92. See, e.g., Samantha Mann, Aldert Vrij & Ray Ball, *Detecting True Lies: Police Officers Ability Due to Detect Suspects' Lies*, 89 J. OF APPLIED PSYCHOL. 137 (2004); Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481 (2005); Scott O'Neal, *Interviewing Self-Confident Con Artists*, 70 FBI L. ENFORCEMENT BULL. 16 (2001); V.A. Sandoval, *Subtle Skills for Building Rapport: Using Neurolinguistic Programming in the Interview Room*, 70 FBI L. ENFORCEMENT BULL. 1 (2001); D. Vessel, *Conducting Successful Interrogations*, 10 FBI L. ENFORCEMENT BULL. 1 (1998).

93. See FRED INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, *CRIMINAL INTERROGATION AND CONFESSIONS*, 77–208 (3d ed. 1985) (providing a list of some of the police techniques).

94. Steven M. Kleinman, *KUBARK Counterintelligence Interrogation Review: Observations of an Interrogator*, in EDUCING INFORMATION *supra* note 82, at 95, 102.

95. Paul Ekman, Maureen O'Sullivan & Mark G. Frank, *A Few Can Catch a Liar*, 10 PSYCHOL. SCI. 263 (1999) (describing the ability of Secret Service, CIA agents, and sheriffs as better at detecting lies than the members of the general public).

96. Mann et al., *supra* note 92, at 137.

97. See Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215 (2005).

CONCLUSION: WHERE DO WE GO FROM HERE?—MAXIMIZING
INFORMATION GAIN AND MINIMIZING HARM

So what is the interrogator who wants accurate information to do? Realistically, interrogators who employ physically coercive interrogation practices—whether using torture or torture “lite”—to obtain information only gain when the useful information they garnered exceeds the costs associated with their methods.⁹⁸ False positives—situations in which innocent people that possess no useful intelligence agree to having done something to stop the pain—are very costly.⁹⁹ First, and most importantly, there is the cost to the innocent victim. In addition to the obvious physical consequences—broken bones, and other maladies caused by physical coercion—there is the neurological and psychological damage. Forceful shaking can cause brain damage, and even death.¹⁰⁰ Studies of torture victims show that other physically coercive methods, even those that fall into the torture “lite” category, may cause lasting neurological damage.¹⁰¹ Moreover, methods that leave no physical scars may mark an individual psychologically for the rest of her life. Water boarding, considered by some a form of torture “lite,” subjects the suspect to near-asphyxiation and can cause severe psychological effects for years to come.¹⁰² In the words of one German POW tortured by the Nazis, “Whoever was tortured stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected.”¹⁰³

In addition to the human costs, torture is also costly politically. Once the news media acquire knowledge of such behavior, the reputation of the torturer—and his country—is damaged. While the reason the information is being acquired can help blunt the damage (for example, torturing the suspect leads to lives being saved), this cannot occur if torture fails to uncover more intelligence. In addition, regardless of whether it is useful or not, the use of coercive practices during interrogation may jeopardize the safety of prisoners of war from the torturer’s own country as other countries decide that they should “take the gloves off, too.”

Finally, for those who tout torture’s effectiveness, and most importantly, there is the cost empirically. Recently, particularly in connection with the coercive interrogations at Abu Ghraib, we have seen that the wide scale use of torture and torture “lite” yield

98. See Leonard Wantchekon & Andrew Healy, *The Game of Torture*, 43 J. OF CONFLICT RESOL. 596 (1999) (presenting a game theoretical model of torture).

99. The issue of false positives is of course not limited to those who are wholly innocent. For instance, Jane Mayer reports that according to sources, “[Khalil] Mohammed claimed responsibilit[ies] for so many crimes that his testimony be[gan] to seem inherently dubious. In addition to confessing to the [Daniel] Pearl murder, he said that he had hatched plans to assassinate President Clinton, President Carter, and Pope John Paul II.” Mayer, *supra* note 67.

100. See Catherine M. Gross, Note, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 314 (2000) (describing the death of Abd al-Samad Harizat who died after being violently shaken by interrogators).

101. See generally Norm O’Rourke, *Vigorous Shaking of Political Prisoners as a Means of Interrogation: Physical, Affective, and Neuropsychological Sequelae*, 18 POL. & LIFE SCI. 31 (1999) (describing the lasting impairment that can be caused by shaking prisoners, considered a form of torture “lite”).

102. See Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468, 474 (2007).

103. AMÉRY, *supra* note 26, at 34.

false positives. Interrogators will not immediately know that a person who confesses falsely actually does not have sound information. Thus, I argue because of incentives placed on the suspect to confess, confessions procured as a result of torture and other physically coercive means must be investigated to determine their truthfulness. This is a time-consuming, and in the case of large numbers of false positives, ultimately a wasteful use of scarce investigative resources.

There is a potential solution. To decrease the number of false positives and increase the amount of overall information garnered, interrogators could torture only those most likely to give up valuable intelligence. This would mean limiting torture to: 1) suspects who the investigator has a strong feeling (or better yet, clear evidence), possess valuable intelligence; and 2) those who are weak-willed enough to succumb to pressure when faced with a high level of pain. I have added the second caveat because suspects who possess information but are strong-willed enough to not surrender it, like the prisoner in the above cited Emily Dickinson poem, may create just as many problems from an intelligence perspective—no useable information may be garnered from them.

This Essay does not advocate that interrogators selectively torture only those likely to divulge information for three reasons, all of which are practical. The first reason has to do with the difficulty, perhaps impossibility, of determining who possesses information and is weak-willed enough to surrender it under torture. Those alleged terrorists identified for interrogation have a range of experience, dedication, training and abilities. For instance, studies have shown variations in individuals who have different triggers and different abilities to withstand pain.¹⁰⁴ Especially in ticking-time-bomb scenarios, there is neither time nor the facility during an interrogation to mine individuals' ability to withstand pain.

The second reason that this essay eschews torture even when employed in a narrow set of circumstances has to do with the nature of both interrogation and torture. Studies of interrogation suggest that, by its very nature, the presumption of guilt underlies interrogation. This presumption sets into motion a process of behavioral confirmation which shapes the interrogator's, as well as the suspect's, behavior.¹⁰⁵ Studies have shown that interrogators frequently approach the task of interrogation with the belief that suspects are guilty.¹⁰⁶ Even when dealing with suspects who are later proven to be innocent, interrogators have a tendency not to reevaluate their presumption of the suspect's guilt. Rather, seeing protestations of innocence as proof of the guilty person's resistance, this causes them to redouble their efforts to elicit a confession.¹⁰⁷ Imagine the effects of this phenomenon if interrogators are allowed to torture the strong-willed: interrogation might be plunged into a death spiral as the suspect refuses to confess and the interrogator becomes more convinced of the suspect's guilt. This could be a recipe for torturing suspects to death, or, at the very least, causing irreparable bodily injury.¹⁰⁸

Finally, even if it was possible to identify those likely to "give up the goods," such an approach might still be unworkable. It simply may be impossible to restrict

104. See INBAU ET AL., *supra* note 93, at 77 (indicating that the selection of interrogation procedures depends on the personal characteristics of the suspect).

105. See Kassin, *supra* note 97, at 215.

106. See *id.* at 216.

107. See *id.* at 219.

108. See O'Rourke, *supra* note 101.

interrogators' ability to torture to a limited number of suspects. This again stems from the very nature of torture. Torture is its own master. It controls the torturer just as surely as it controls its victims. Ordinary individuals' susceptibility to becoming torturers and willingly torturing others even to death has been demonstrated both by laboratory experience and in excesses in the field.¹⁰⁹ In the Milgrim experiments, conducted in the early 1960s at Yale, ordinary individuals were willing to follow instructions to administer powerful electric shocks (in some cases as high as 450 V) to screaming victims, and even to continue administering the shocks when the screams stopped, presumably because the victim had lost consciousness or died.¹¹⁰ All of this suggests that it doesn't take a sadist to become a torturer. It is easy for this practice to become second nature, at which point it will be quite difficult to maintain any type of restrictions on its use.

Given the high costs of torture, and the absence of data on its effectiveness, are interrogators left with nothing? Clearly they are not. Police in the United States do not have torture available to them, and they have been quite successful in securing confessions. Those interrogating suspected terrorists are engaged in a similar task—trying to elicit information. It may be that not using torture will be more effective than having it at one's disposal. Studies, interviews with experienced interrogators, and interrogation manuals all suggest that one of the best ways of getting a suspect to talk is to use a highly skilled, well-trained interrogator who has a variety of tools at his or her disposal and, more importantly, recognizes which ones are most applicable, given the situation. As one veteran interrogator interviewed by Bowden said:

You want a good interrogator? . . . Give me somebody who people like and who likes people. Give me somebody who knows how to put people at ease. Because the more comfortable they are, the more they talk, and the more trouble they're in—the harder it is to sustain a lie.¹¹¹

How successful can interrogators who don't use torture be? Richard Leo, one of the foremost scholars of police interrogation found that police have developed techniques which are remarkably successful at producing confessions. Leo spent several months observing police interrogators in a major urban police department and also based his observations on tapes of interrogations at another department.¹¹² Police in the United States are of course forbidden to torture suspects during interrogation. Leo observed no behavior that could be classified as torture. Moreover, in all of the interrogations he observed, the use of coercive interrogation methods was exceedingly rare, occurring in only two percent of cases.¹¹³ Despite the absence of physical and most psychological coercion, detectives were remarkably successful at getting suspects to confess. Leo found that when detectives actually attempted to gain incriminating information, their

109. A number of detainees have been killed in U.S. custody in Cuba, Afghanistan, and Iraq. See, e.g., Schmitt, *supra* note 29 (describing the deaths of six detainees which occurred as a result of detainee abuse); Joshua White, *Documents Tell a Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A1 (describing an interrogation that killed a fifty-six-year-old detainee).

110. See Charles Helm & Mario Morelli, *Stanley Milgram and the Obedience Experiment*, 7 POL. THEORY 321 (1979) (describing Milgram's experiments).

111. Bowden, *supra* note 18, at 58.

112. Leo, *supra* note 20, at 268.

113. *Id.* at 282–83.

techniques yielded a partial admission or full confession more than three-fourths of the time.¹¹⁴ It is not clear from Leo's work how widespread such success is. He did believe that this success could be exported, hypothesizing that the level of success he found would be similar in departments where similar techniques are in use.¹¹⁵ While their precise effectiveness in the terrorism context has not been evaluated systematically, the methods used in American police departments are very similar to what those experienced with interrogation—both in the United States and abroad—assert to be the most effective. Similar methods are also described in CIA interrogation manuals and used to train interrogators.¹¹⁶

Paradoxically, the moral and legal prohibition of physically coercive mechanisms may have had unintended consequences. Instead of steering interrogators to other mechanisms, it has increased inexperienced interrogators' bloodlust. For poorly-trained investigators, physical coercion has become the longed-for instrument of last resort. They believe that torture will get the recalcitrant detainee to talk. Unfortunately, the infliction of pain becomes its own master. When interrogators resort to applying force, any knowledge they have regarding other methods that might be employed goes right out of the window. From an intelligence perspective, this might be more acceptable if there were clear evidence of torture's effectiveness.

In the war on terrorism, the risks of not catching terrorists are even higher than in the domestic context. Thinking about the quest to capture the most useful intelligence from an interrogator's perspective suggests that we should take a harder look at what methods work and reevaluate whether tangible benefits actually stem from brutal methods like torture.

114. *Id.* at 281.

115. *Id.*

116. See Kleinman, *supra* note 94, at 100 (comparing criminal cases and foreign intelligence).