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## Slavery and the Phenomenology of Torture

THE YEAR 2007 WILL BE THE SESQUICENTENNIAL OF THE *DRED SCOTT* case, perhaps the most reviled case in American constitutional history because of its endorsement of slavery as constitutionally protected.<sup>1</sup> Slavery might have been evil, but this did not prevent its full integration into the warp and woof of American constitutional law, not least because the presumed overarching good of creating and then maintaining a union took precedence over alleviating the plight of slaves. Even if most people believed that a society without slavery would certainly be better than a society with it, they also believed that eliminating slavery was not worth the risk of dissolution of the union and the presumed costs attached to that dire possibility. In this context, one might recall that Lincoln, in his first inaugural address, went out of his way to reassure the slave states not only that he meant no harm to their entrenched practices, but also that that he would support a proposed constitutional amendment that would in effect guarantee the maintenance of slavery in perpetuity, at least in the absence of a voluntary decision by the affected states to cease the practice. And it is worth recalling as well that the Emancipation Proclamation was notorious for failing to free a single slave in the four “union states” where slavery remained fully legal—Missouri, Maryland, Kentucky, and Delaware—not least because of fear of switches in loyalty especially by unionist Missouri and Kentucky slaveholders.

For many, torture is at least as evil as slavery. Yet we have learned, over the past five years especially, that for many Americans the

presumed overarching good of maintaining our national security takes precedence over the plight of those subjected to highly coercive, even tortuous, means of interrogation. As with slavery, exceedingly problematic modes of interrogation are being integrated into the warp and woof of our present legal order. And, as with slavery, the possibility of terminating the practice is viewed by many Americans, when all is said and done, as potentially more harmful than maintaining it, with all of its acknowledged costs.

I believe, though, that the most direct reason to look at torture through the prism provided by a 150-year-old case involving chattel slavery is that the most fundamental legal and moral issues raised by slavery and torture are astonishingly similar. Both ultimately raise issues of “sovereignty”—that is, the possession of absolute and unconstrained power—and, therefore, the challenge to “sovereignty” that is implicit in any liberal notion of *limited* government. Both *Dred Scott* and those who defend torture today ask us if we believe that there are indeed categories of persons who quite literally have “no rights” that the rest of us are “bound to respect.”

This article is divided into three sections: The first discusses why, as both a political theorist of sorts and as a lawyer, I find the issue of torture both compelling and yet intellectually and morally perplexing. The second section is built around my belief that the word “torture” tends basically to be a placeholder, which means that it needs to be filled in with concrete definitions and exemplars that are often lacking. Any serious discussion of the subject—including, obviously, its ethical dimensions—therefore has to confront the reality that there is almost certainly far less agreement than we might hope as to what even counts as torture, let alone if there are any circumstances that might justify its infliction.

This means, among other things, that any real progress with regard to establishing acceptable social policies—as distinguished from engaging in polemical argument—requires that we engage in an altogether unpleasant and grim task of offering fairly precise notions of what counts as torture. This carries with it the ineluctable consequence that to define *x*, *y*, and *z* as “torture” may be to suggest that *a* through *w*,

however open to criticism and perhaps description as quite awful—perhaps even “cruel, inhuman, and degrading”—is still different from “torture” and thus not subject to the almost unique condemnation connected to the term “torture” and “torturer.” One might, of course, say somewhat similar things with regard to “slavery” and “not-slavery,” also oft unanalyzed notions.

The last section will take a considerably different tack, and it may be in tension with the thrust of the second section and its emphasis on specificity and concrete acts. I want to raise the possibility that “torture,” in a profound sense, is less about concrete acts than about the creation of a phenomenological reality of total control. Indeed, if this effort is successful, it may become quite unnecessary to engage in the acts themselves. As David Sussman has suggested, one might have to consider the possibility that something accurately described as torture “need not involve touching the victim’s body, so long as his physical environment is appropriately controlled” (Sussman, 2005: 27). This is no small point, for it suggests that we might be mistaken in concentrating almost exclusively on the extent to which torture necessarily entails what Elaine Scarry so memorably labeled “the body in pain” (Scarry, 1987). The essence of a totalistic system of political control, after all, is that it might not be necessary to inflict pain all that often so long as what Justice Holmes might have called the “sovereign prerogative of the choice to inflict pain” is ever-present. Defending the creation of such phenomenological realities should raise especially profound difficulties for anyone committed to any version of political theory that emphasizes the status of persons as rights-bearing individuals. It is at this point that I will return to the *Dred Scott* case and focus more extensively on contemporary implications of Chief Justice Taney’s horrific sentence describing blacks as “having no rights that whites were bound to respect.”

I begin with a brief excursion into autobiography. I arrived in Cambridge in 1962 to pursue a doctorate in political science. Because I had written a senior thesis at Duke on national security policy, I came to Harvard

with the intention of becoming a member of that new breed called “defense intellectuals,” a group who spent most of their time engaged in close analysis of the circumstances under which one could credibly threaten to use horrendous weapons that would almost certainly kill millions of people.

I recall being perplexed at the time as to how we decided what kinds of state-imposed deaths are legitimately “thinkable” and which, on the contrary, are subject to categorical condemnation. Why was it, for example, that the use of poison gas was universally condemned, and not only on the consequentialist grounds that it could not be adequately controlled to affect only the enemy and not one’s own troops as well? Even to counsel the possibility of using such a weapon was to expose oneself as a barbarian in a way that was not the case if one suggested the wisdom of obliterating cities, if “necessary,” as part of the Clausewitzian extension of politics by other means.

As it happens, for reasons that need not be gone into, I “migrated” from Henry Kissinger, Harvard’s leading “defense intellectual” and the author of *Nuclear Weapons and Foreign Policy*, a leading book of the era, to Robert McCloskey and the study of American constitutional history. Yet I find myself returning to some of those earlier interests, in part because of the implications for certain classic questions in constitutional law. I continue to be perplexed by how we divide the world into thinkable—and altogether acceptable—modes of violence and those that are beyond the pale.

It is well to be reminded that Elaine Scarry’s indispensable *The Body in Pain: The Making and Unmaking of the World* (1987) contains a chapter on warfare that is every bit as remarkable—and unforgettable—as its probably more famous chapters on torture. Scarry, like Homer in the *Iliad*, teaches us that the essence of war is a “contest” in which the metric is the ability to injure, maim, and kill the enemy more successfully than the enemy can do in return. She invites us to imagine alternative forms of contests, such as, my favorite, a singing contest in which conflict would be settled through deciding who can sing the most beautiful songs. But we know that is fantasy, for war is injuring, maiming, and killing.

Moreover, in modern times, the injuring, maiming, and killing is most certainly not restricted to the actual soldiers or other “combatants” in organized warfare. The phrase “collateral damage” has entered into our technocratic vocabulary to capture this reality.

Scarry carefully distinguishes “war” from “torture” and argues that the latter is worse, in a fundamental way, than the former. That is just to say, perhaps, that she is not a pacifist. As a matter of fact, Scarry analogizes nuclear warfare with torture, which obviously raises the possibility that anyone who accepts what might be termed the “absolutist” argument against torture, to which I shall turn presently, should, at the very least, recognize that it compels as well the repudiation of nuclear deterrence as a military strategy. A retaliatory strike by definition occurs only after an initial attack, by which time it is obviously too late to save New York, Chicago, Tel Aviv, or whatever the target might have been. At that point, the only function served by a second-strike, if it is other than “counterforce” (as against “counter city”) is pure revenge. Millions of innocent persons are incinerated for no apparent point beyond any satisfaction attached to revenge.

Would a decent, ethical person ever order, or carry out orders for, a second-strike?<sup>2</sup> One might well doubt it, which is, of course, one reason why theorists like Herman Kahn in the 1960s posited “doomsday machines” that would take such decisions out of the human realm and instead guarantee that the missiles would fly once the machine sensed that a certain line had been breached (Kahn, 1960). Kahn was responding to a real problem, which is the ethical madness of “mutually assured destruction” as a strategy.

These issues were once discussed with some vigor, though they appear to have fundamentally disappeared from the public realm. Although there is an increasingly extensive examination of the “ethics of torture,” there appears to be surprisingly little interest in offering similar examination of the ways we conduct wars more generally.

At least one thoughtful observer, Georgetown law professor Louis Michael Seidman, has expressed deep concerns about what he views as the near obsession with the issues of torture and the treatment of

detainees, however important they are, to the exclusion of sufficient concern about other aspects of the contemporary realities of warfare, both actual and proposed (Seidman, 2005: 881).

It is necessary to recognize the extent to which the present discussion of torture arises within the context of developments in the ways that cross-border warfare is now conducted. Most military conflict, at least for the past several hundred years, has arisen on a state-to-state basis. (By using the term “cross-border,” I mean to elide the particular kind of military conflict subsumed under notions of “civil war” or “domestic insurgencies.”) Indeed, the logic of deterrence requires that potential enemies have specifiable geographical “addresses” to which retaliatory strikes can be sent. Moreover, the “reciprocity” rationales for obedience to certain norms of warfare depend, at bottom, on the same sort of state-centered warfare and the willingness even of barbarian countries, such as Nazi Germany, to adhere to certain norms regarding treatment of prisoners of war if they believed it would lead to similar treatment being accorded their own captured soldiers.

Though some contemporary cross-border conflict fits this state-centered model, a fundamental reality of our current situation is the importance of what has come to be called “asymmetric warfare,” often conducted by what my colleague Philip Bobbitt has labeled “virtual states” (Bobbitt, 2006). These groups lack addresses even as they may have the capacity to inflict warlike modes of violence, the most notorious example of which, of course, is September 11. Because threats of retaliation are thought, probably correctly, to be unavailing against such inchoate organizations, emphasis shifts from “detering” attacks to gaining information that can fend off the occurrence of any such attack in the first place. Ironically, a robust system of deterrence and retaliation allows for a considerable measure of risk-taking, since it assumed that a rational enemy will be aware of the costs of aggressive action and behave accordingly. That model does not hold in conflicts with basically unlocatable virtual states. Note that this requires no untenable assumptions that the leaders of such “states” are more “irrational” than leaders of territorial states, only that they are subject to a very different risk

calculus. So this brings us specifically to the debate about torture, which arises almost entirely because of the role that these virtual states play in contemporary public affairs and the felt need for accurate information about their future plans.

Perhaps this is the appropriate point to indicate that I have extremely mixed feelings about one common move in this debate, which is to question whether torture is *ever* effective in procuring accurate information. Even if one concedes, as I believe to be the case, that it far less effective than is claimed by some of its enthusiastic partisans, almost none of whom are experienced interrogators, there seems little reason to doubt that it has on occasion been efficacious. The Supreme Court of Israel, even as it courageously invalidated many modes of interrogation used by the General Security Services of that state, stated that “[m]any attacks—including suicide bombings, attempts to detonate car bombs, kidnappings of citizens and soldiers, attempts to hijack buses, murders, the placing of explosives, etc.—were prevented due to the measures taken by the GSS” (Supreme Court of Israel, 2006: 165), which, incidentally, were described only as “inhumane” and not as “torture” by the court.

If we could be confident that torture *never* worked, then there would in fact be nothing to debate. Only a sadist would defend coercive interrogation under such circumstances. But consider only a recent case arising in Germany, involving a 2002 kidnapping of an 11-year-old boy (Jessberger, 2005: 1059). The kidnapper was arrested while picking up the million-euro ransom. During his interrogation he refused to indicate where the youngster was. In fact, he had already murdered him. Finally, on the second day of the interrogation, which by now was four days after the kidnapping, a Frankfurt police officer, Wolfgang Daschner, ordered that pain be used to procure the information. A subordinate police officer told the defendant that his continued failure to cooperate would result in the infliction of pain that “he would never forget.” Because of this threat, which was never carried out, the defendant confessed and indicated where the body was located. (He was subsequently sentenced to life imprisonment.)

Not only the defendant faced legal problems. The police officer and his subordinate were both charged with violating an absolute prohi-

bition on torture in contemporary German law. The threat to torture is an offense in itself, so it is legally irrelevant that it was not carried out. A German court found both of the police officers guilty. (It is worth mentioning that Germany, as a civil law country, does not rely on citizen juries. One can well ask if any jury in the United States would have, or even should have, convicted the officers under these circumstances.) One strand of argument held that less dire means of procuring the information were available. Another held that the ban on torture was absolute.

As every legal realist knows, though, it is not enough, when examining a legal system, to know only what sorts of acts trigger formal legal liability. It is also important to know what the actual cost of violating the law is. And here things get especially interesting. The German court found that there were “massive mitigating circumstances” that justified only limited punishment. Although the relevant law allowed, and perhaps even demanded, some time in prison, the court instead only fined the two officers: 10,800 euros for the superior officer and 3,600 euros for his subordinate who actually issued the threat, and issued reprimands rather than requiring jail time. This has aptly been described as “guilty, but not to be punished,” which suggests that the court and anyone who sympathizes with its “solomonic” solution finds this particular deviation from the ban on torture to be at least quasi-acceptable.

There are two further things that need to be said about the Daschner case. First, it had absolutely nothing to do with national security. Second, the number of potential innocent lives thought to be savable through the threat of torture was one. I leave it to the reader to decide whether Daschner was justly treated by the German legal system and what implications his case might have when national security is involved and when the purported number of lives at stake is considerably higher than one.

In any event, I believe that arguing that torture is *always* inefficacious is often simply an attempt to evade making a full-scale moral defense of an anti-torture position by presenting oneself in the posture of a utilitarian cost-benefit analyst who comes to the happy conclusion that the costs of torture, which are many, *always* outweigh any potential benefits. I can readily understand the temptation to make such an



argument. It is not easy in the culture that most of us inhabit to be an unabashed “moralist” of the Kantian variety. It is relatively easy to “take rights seriously,” including the right not to be tortured, if one believes that the costs of honoring the right are relatively limited—what Frederick Schauer labels the generation merely of “suboptimal” outcomes rather than “catastrophes” (Schauer, 1991). After all, the very point of rights, as Ronald Dworkin insists, is to privilege them over undeniable “gains” to the overall society. As with any other important value, one must argue that potential social costs are in some profound sense irrelevant, at least if we wish to maintain a self-image of a society that does indeed take rights seriously. It is not clear that model of “taking rights seriously” accurately describes our own legal order, at least when potential social costs move away from the merely suboptimal toward the catastrophic. And, of course, we can readily debate whether that model of “taking rights seriously” *should* prevail as we move along the spectrum of potential consequences. “Let justice be done though the heavens fall,” however inspiring in some contexts, is not, I dare say, accepted by most people, including, I must add, moral theorists. On this point, I can do no better than to quote my sometime colleague at Harvard Law School, Charles Fried, who writes of the prohibition against “killing an innocent person [in order to] save a whole nation.” “It seems *fanatical*,” writes Fried, “to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall” (quoted in Levinson, 2006: 31-32. *Emphasis added*).

But such absoluteness appears to be required by the remarkably unequivocal language of the ban on torture set out in the United Nations Convention against Torture (CAT), one of the few human rights treaties ratified by the United States. Article II of the CAT states that “[n]o *exceptional circumstances whatsoever*, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (*emphasis added*). I have often described this as the most “Kantian” passage that I am familiar with in any legal materials. With a remarkable degree of self-consciousness, it appears to rule out appeals to what has become a chestnut of contemporary constitutional analysis in the United States: this is the ability to override what otherwise appear to be clear constitutional

prohibitions by positing a “compelling state interest” that will authorize the override. Perhaps the clearest example is the statement of the First Amendment that Congress shall pass *no law* abridging freedom of speech or the press. Every well-trained constitutional lawyer knows that “no law” does not in fact mean “no law under any circumstances,” but, rather, “no law unless the state can demonstrate, in the instant case, a compelling public interest justifying the limitation.”

With regard to torture, that move appears to be ruled out. If one takes the CAT seriously, it appears to require that one must indeed allow the heavens to fall rather than engage in the particular injustice called “torture.” Such a view is in direct conflict with what I term “the logic of the compelling state interest.”

As David Luban has noted, the Senate, although it ratified the convention and, therefore, Article II, did *not* include the quoted language when passing legislation implementing the Convention against Torture (Luban, 2005: 60). One might, of course, castigate Congress for being remiss in not including the specific language of Article II. But consider the possibility that no responsible legislator—or at least no legislator who had read and been persuaded by Michael Walzer’s classic essay on “dirty hands” (1973)—would actually vote for legislation that on its face appears to preclude even the *possibility* of a defense with regard to someone charged with torture.

Consider in this context a recent comment by Democratic Senator Hillary Clinton: “In the event we were ever confronted with having to interrogate a detainee with knowledge of an imminent threat to millions of Americans, then the decision to depart from standard international practices must be made by the President, and the President must be held accountable. That very, very narrow exception within very, very limited circumstances is better than blasting a big hole in our entire law” (“McCain Team,” 2006). Interestingly enough, the article in the *New York Daily News* discussing her speech was headlined “McCain Team Mocks Hil Torture Loophole” and it included a dismissive comment by Republican Senator John McCain’s chief political aide stating that he was “shocked Sen. Clinton would try to have it both ways,” perhaps referring to the fact that she had voted against the

Military Commission Act supported by Senator McCain and almost all other Republicans. But an official connected with Human Rights Watch also indicated his disappointment: “Once you open the door to this sort of thing, you legitimize the practice” (“McCain Team, 2006). But this, of course, is just to reopen the question set out by Fried and Walzer, usually on the opposite side of the political spectrum: Do we *really* believe that *no circumstances whatsoever* could possibly legitimize even one instance of torture or, as in Germany, the threat of torture? Or, on the contrary, do we elect presidents at least in part to make agonizing choices in the truly “hard cases” that might present genuine dilemmas as to how to protect the nation against potentially catastrophic threats?

## II

At the very least, it should be crystal clear that any regime that absolutizes the prohibition of torture will place immense pressures on those charged with defining the practice. After all, by definition, “torture” can never be contemplated; the negative implication, though, is that “less than torture,” even if abhorrent in its own ways, could, under at least some restricted circumstances, be used. There is thus a certain incentive to cordon off definitions of “torture” from the practices that one can in fact envision engaging in.

In the course of compiling a useful booklet, *Defining Torture*, Gail H. Miller writes that “a definition of torture must be clear, uniform, adequately strict, and universally accepted” (Miller, 2005: 5). There are two basic problems with definitions that do not meet these daunting conditions, both of them identified in a 1973 report issued by Amnesty International. “Given that the word ‘torture’ conveys an idea repugnant to humanity, there is a strong tendency by torturers to call it by another name. . . .” One is surely not surprised that Amnesty International cautions us not to accept euphemisms for what ought rightfully to be denominated “torture.” But it is surprising to read another warning, that there is a “tendency of victims to use the word too broadly not least to take advantage of the opprobrium attached to anyone even charged with “torture” (see Miller, 2006, quoting Amnesty International, *Report on Torture* [1973]: 29-30). Moreover, there is the practical problem, at least with regard to

structuring a legal system, that those officials charged with complying with the laws prohibiting torture, and threatened with significant criminal punishment should they not do so, are entitled to some reasonably clear idea of kind of conduct will put them in legal peril.

Consider the recent debate regarding the Military Commissions Act (2006) over the incorporation of the prohibition by Article 3 of the Geneva Conventions of “outrages upon human dignity.” President George W. Bush has received scornful criticism for asking “What does that mean, ‘outrages upon human dignity?’” He argued that “our professionals” must have “clarity in the law” if they are to do their job, which is to interrogate persons and gain information vital to national security (Rutenburg and Stolberg, 2006: A11).

One of the points made by the president is precisely that the crux of the debate about interrogation does *not* concern travesties like Abu Ghraib. Not only are these indefensible but also, in fact, they receive no defense from any reasonable person. Rather, the debate is about the freedom of action we as a society are willing to accord trained professionals whose particular vocation is interrogation. It will not do, incidentally, to scoff at the creation of such professionals unless we are willing to engage in similar disdain for the military as a profession. All are devoted to thinking through the most freighted questions surrounding the use of force to attain national goals, including the goal of self defense. And, of course, we are necessarily discussing yet another profession, that of the law, with regard to establishing adequate control over professional interrogators to reduce—or, ideally, to eliminate—going over the line of what we as a society are willing to tolerate.

One of the more ironic aspects of the recent debate is that many members of Congress, supported by many who identify with the international human rights community, successfully objected to the Bush administration’s desire to specify a set of prohibited methods of interrogation because of altogether justified fears that anything not specified would therefore be treated as permissible. So instead of indicating certain acts, such as “waterboarding,” by which persons are made to feel that they are drowning, as prohibited, the Military Commissions Act instead offers a more general definition of torture as any “act specifi-

cally intended to inflict *severe* physical or mental pain or suffering.” What counts as “severe” pain is, of course, not self-evident; nor is the task made any easier by the fact that a section defining “cruel or inhuman treatment” refers to *both* “severe or serious physical or mental pain,” which invites any well-trained lawyer (at least in the sense that law schools define as “well trained”) to differentiate between “severe” and “serious” and require that anything meeting the standard of “torture,” rather than “merely” cruel or inhuman treatment, meet the severity requirement.

In any event, the wish expressed by Miller that there be a “clear, uniform, adequately strict, and universally accepted” definition of torture approaches the utopian. There is not now, and is unlikely to be in the foreseeable future, any such definition that could meet all four criteria. Anything that could possibly be universally accepted, as an empirical matter, is likely to be what lawyers sometimes term “void for vagueness.”

This being said, I do not see how we can give up the duty of addressing specific acts, whether waterboarding, hypothermia, or sleep-deprivation, to name only the three most common discussed techniques that have been used by the United States over the past five years, and deciding whether they, and many others that could be mentioned, meet our criteria for torture or instead should be described as a less-condemnable mode of interrogation. That may turn out to be no great compliment if, for example, we agree that something, though not torture, is, nonetheless, “cruel, inhuman, or degrading.” But then we must move on to attempt to discover the difference between what is only “coercive,” or even “highly coercive,” but not of sufficient magnitude to enter the world of the “cruel, inhuman, and degrading,” let alone “torture.”

There is, to put it mildly, something awful about such a conversation. Michael Walzer famously wrote about the duty of political leaders to accept the possibility of “dirty hands” (including the possibility of torture). Few lawyers or ethicists will be in a Walzerian position to decide between the Weberian duty of responsibility as against a ethic of ultimate ends. Our hands may therefore remain clean. But even if we remain commentators from the sidelines, we have a duty to sully our minds by way of wrestling with what kind of modes of interrogation we will deem acceptable.

The only way to avoid such inquiries is to declare that people suspected of possessing important information about major potential future harms—and who are suspected as well as in some significant sense being the “cause” of those threats, as through active membership in a group committed to terrorist activity—should basically be allowed to avoid any significant interrogation at all. That is, they should be treated the way we treat (or would like to believe that we treat) “ordinary” criminal defendants who are immediately read their “Miranda rights” and accept the advice of their attorney to say nothing. Once we countenance a “gap” between such defendants, who are arrested because of what they are suspected to have done in the past, and people we are interested in interrogating because of what they might know about the future, then we have no alternative but to get our minds dirty by attempting to discern the line between the “coercive but acceptable” and the forbidden movement into the realm of the unacceptable. Are 24 hours of sleep deprivation all right, but 36 to be forbidden? (And what, therefore, about 28?) Is a 14-day period of solitary confinement in a windowless room, even without having to listen to loud and jarring rock music, tortuous in a way that a three-day period, perhaps with the accompaniment of Led Zeppelin, not?

Heather McDonald, trained at Stanford Law School, is highly censorious of those who condemn most methods used by American interrogators. She describes as “light years from real torture” (MacDonald, 2005: 84) the methods allegedly used by American interrogators, though she does confess to a bit of uncertainty about “waterboarding.” Jean Bethke Elshtain has also been critical of human rights activists who are promiscuous in their use of loaded terms like torture (Elshtain, 2006). But, recall, even Amnesty International conceded that at least some who were undoubtedly subjected to state oppression may nonetheless have been too quick to claim the label of “torture victim” for themselves.

“Meaning is use,” Wittgenstein famously declared, and I think this is as true of the term “torture” as of any other morally loaded term. We must discuss what it is about *this* encounter or *that* interrogation that leads us to say, with confidence, that it is an instance of “torture,” “cruel, inhuman, or degrading” conduct, or simply “highly coercive” interrogation? As I have

already suggested, I do not think anyone really wants to engage in such conversations. They might lead us, for example, to decide that relatively little that occurred at Abu Ghraib counted as “torture,” even if almost all of it surely exemplified “cruel, inhuman, and degrading” conduct that, of course, had nothing whatsoever to do with interrogation. Because of that elemental fact, Abu Ghraib therefore has less to teach us than some might hope when it comes to, for example, the activities of highly trained professional interrogators working for the CIA. Indeed, it is *these* individuals, and not the almost incredibly untrained amateurs at Abu Ghraib, who triggered the so-called torture memo within the Office of Legal Counsel of the Justice Department and subsequent discussions about American policy.

### III

In thinking about the interrogation relationship even, or perhaps especially, when engaged in by trained professionals, I want to return to Heather MacDonald, who writes that “[u]ncertainty is the interrogator’s most powerful ally; explored wisely, it can lead the detainee to believe that the interrogator is in *total control* and holds the key to his future” (MacDonald, 2005: 86. *Emphasis added*). She is critical of procedures whereby American techniques of interrogation have been made public. Not only does this provide “al Qaeda analysts with an encyclopedia of U.S. methods and constraints.” More to the point, in a way, is that any constraints on interrogation methods “make perfectly clear that the interrogator is not in control.” Thus she quotes an unnamed “senior Pentagon intelligence official” who “laments” that “[i]n reassuring the world about our limits, we have destroyed our biggest assets: detainee doubt” (MacDonald, 2005: 94-95).

David Sussman’s far more sophisticated analysis of torture—and his attempt to answer the question “What’s Wrong with Torture”—equally emphasizes the crucial role of absolute vulnerability. “Victims of torture,” he wrote, “must be, and must realize themselves to be, completely at the mercy of their tormentors” (Sussman, 2005: 6). “The asymmetry of power, knowledge, and prerogative is absolute: the victim is in a position of complete vulnerability and exposure, the torturer in one of perfect control

and inscrutability” (Sussman, 2005: 7). “The torturer . . . makes himself into a kind of perverted God. . . .” Sussman quotes Jean Amery’s reference to the “agonizing sovereignty” exercised over him by the person who tortured him (Sussman, 2005: 26). Sussman thus answers his question by suggesting that “[w]hatever makes torture distinctively bad”—worse, say, than the infliction of “collateral” damage on innocent victims of a bombing raid—“must have something to do with the sort of interpersonal relationship it enacts, a relationship that realizes a profound violation of the victim’s humanity and autonomy” (Sussman, 2005: 19).

As it happens, Sussman, like Elaine Scarry, links torture, understandably enough, to the infliction of pain. It would be perverse to deny the ubiquitous empirical connection between torture and “the body in pain.” But, as Sussman and Scarry both note, we inflict pain all the time on innocents as part of the conduct of the “injury contest” we call war, even if we did not directly “intend” that innocents be harmed. And, frankly, I find the recourse to “double effect” arguments to distinguish between ethically admissible injuries, maiming, or killings of innocents and those that are instead condemnable often to be quite facile. Too often they serve as a way of avoiding responsibility, by reference to the purity of one’s intentions, rather than acknowledging the awful costs that can be exacted by the pure in heart.

Nonetheless, I do agree that what distinguishes torture from these other sometimes abominable acts in the world is that only the former requires a phenomenology by which the victim is made to realize that he is a totally rightless individual, a pure object of the interrogator’s will, with no way of affecting his own future other than by giving the interrogator whatever he or she wants. (Even suicide is in effect prohibited, as at Guantánamo, where hunger strikers are being force-fed lest they be allowed what the US military has described as a “victory” in the “asymmetric warfare” being conducted by the hapless detainees against the Americans.)

Thus we return to *Dred Scott* and the question of whether we wish as a country to adopt as a method of interrogation the creation of a belief that we indeed recognize no limits, that any forbearance is merely a sovereign “act of grace” that can be succeeded, in an instant,



by wrathful infliction of pain. Ironically, one might argue that the successful inculcation of such complete dependence and vulnerability will *lessen* the need to inflict the pain itself, inasmuch as a “rational” detainee will have every incentive to submit early on in the process.

One might recall in this context the controversy provoked some 30 years ago by the publication of *Time and the Cross*, by Robert Fogel and Stanley Engerman, one of whose theses was that the frequency of violence against slaves was significantly less than that assumed by most abolitionists. The reason was simple: so long as slaves knew that violence was possible whenever a master so wished, then they would behave in ways that minimized the likelihood of bringing about that violence.

The slave was treated as having sufficient human agency to decide, in effect, whether or not it would be “necessary” for the master to punish him or her. The master would prefer to minimize the incidence of violence; after all, the slave was a productive asset who might indeed be harmed through the infliction of violent methods of discipline. Similarly, a professional interrogator would presumably prefer to minimize the incidence of violence as well. But one of the most insidious features of this phenomenology is that it is the person being interrogated, rather than the interrogator, who in some sense becomes “responsible” for the level of pain to be inflicted. Just as a parent sometimes tells a child, “I wish I didn’t have to punish you this way, but you leave me no alternative,” so does the torturer in effect blame the person being tortured for “forcing” the torturer to the next level of inflicting pain.

Can such a phenomenology successfully operate if the person being interrogated is actually made to feel that he or she has rights that the interrogator is bound to respect? No doubt, as many memoirs show, such assurance may lead people to cooperate, not least because this basic recognition of humanity may run counter to assumptions made about the nature of the enemy. But, obviously, one must also be aware that if it is known that there indeed are limits to the modes of potential interrogation, then it may well be the case that our enemies will train themselves to withstand whatever we are legally able to throw at them, just as American soldiers are trained to withstand harsh interrogation practices. Interrogators will feel it incumbent to use whatever legal

methods of interrogation are allowed, including those that are “highly coercive” and even, perhaps, “cruel, inhuman, and degrading,” in an effort to break the will of the person being interrogated. Yet the victims of such interrogations can reasonably hope for the immense satisfaction of outlasting whatever is done to them. Indeed, to break will be a sign of moral weakness. Thus the need to move toward total domination.

Even if there may be some truth in the assumptions made in the last paragraph, I am unwilling that the United States adopt, or be perceived as adopting, what I am labeling the “*Dred Scott* policy” of stripping individuals of any rights whatsoever. Indeed, as I prepared this paper, I realized that in a very real sense those who are tortured are *always* treated worse than many slaves were, as an empirical matter, treated. Thus Dred Scott himself was allowed to marry, and Dred and Harriet Scott apparently were able to preserve an intact family with their two daughters. Many slaves, of course, had it far worse, but one of the many anomalies of the *Dred Scott* case is that we realize that Dred Scott was in fact treated with a measure of humanity by his owner. That can never be said with regard to someone who is tortured. This obviously does not serve to justify slavery, and one can be sure that the Scott family had a ubiquitous awareness that they were indeed at the mercy of their “master’s” power.

#### IV

Every time I return to systematically thinking about the issues raised by torture, I find myself moving closer and closer to the “absolutist” positions embraced by writers such as Ariel Dorfman, Elaine Scarry, David Luban, and Jeremy Waldron, not least because I become ever more distrustful of my own government and the good faith of those who profess these days to speak for the American people. If one adopts Judith Shklar’s basic definition of liberalism as the avoidance of cruelty, then nothing is easier, in a way, than adopting an absolute ban against a practice whose every aspect instantiates cruelty.

But, at the end of the day, and of this essay, I realize that I remain in the Walzerian camp. What one most wants if political leadership with the kind of *character*, as well as disciplined mind, to be

able to wrestle with the sometimes demonic aspects of public responsibility and retain public trust. The most fundamental question facing a modern democratic order is whether it is likely to produce leaders with adequate character to play the complex—some, of course, would say incoherent—roles assigned them by Walzer, who requires leaders to abandon, when necessary, the ethic of ultimate ends in favor of the ethic of political responsibility, but to feel suitably guilty about doing so. Whether we can hope for such character in leaders produced by our modern political order is, thankfully, the subject for another essay.

#### NOTES

1. An earlier version of this article was prepared for delivery at the Edmond J. Safra Foundation Center for Ethics, Harvard University, October 27, 2006.
2. I put to one side the question whether a decent and ethical person would engage in policies that he or she believed would increase substantially the risk of nuclear war in the first place, as, arguably, was the case with John F. Kennedy's decision to impose a blockade on Soviet ships traveling to Cuba during the Cuban Missile Crisis. See my review of Abram Chayes' 1974 book, *The Cuban Missile Crisis: International Crisis and the Role of Law* (Levinson, 1975: 1185). I argued that Chayes avoided any serious discussion of this issue.

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