TORTURE: NOT AN OPTION

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Introduction:

I think most people would agree that torture is an abhorrent concept. It is quintessentially cruel, inhumane and degrading. It is also notoriously unreliable as an instrument for obtaining the truth. Torture is illegal, world wide. It is prohibited under the United Nations Conventions, the Geneva Conventions, several international treaties, and the domestic laws of most Western Countries, including the United States. Yet, torture persists. It is still used in over 132 countries today, many of which espouse democratic principles and human rights.[1]

The debate over the necessity for torture has taken on renewed vigor in the aftermath of September 11th, as the United States and other nations have struggled to find more effective ways to garner intelligence in the so-called "war on terror." In my view, torture should never be considered legally permissible, no matter how pressing the circumstances. However, as we shall see, there is a persuasive argument on the other side, that under certain very narrow circumstances, torture may be seen as morally acceptable.

In my presentation tonight, I will be considering the following five questions:

- First, what do we mean by torture?
- Secondly, how did the use of torture as a part of the legal system develop historically?
- What is the current law on torture in the U.S. and world-wide?
- Next, what has been the practice on the use of torture by the United States, following 9/11?
- Finally, what should U.S. policy be – from moral, ethical and legal perspectives?

Torture Defined

In order to achieve clarity in the argument on whether or not torture should be permitted, there must first be agreement on what the word means. Despite the existence of numerous laws defining torture, there is still disagreement on the subject. The recent controversy in the U.S. Senate confirmation hearings on the appointment of Michael Mukasey as Attorney General is a case in point. Mukasey steadfastly refused to state his opinion on whether waterboarding was torture, in the face of persistent prodding by the Senators. "Waterboarding," for anyone who may have been in a coma for a number of months, or perhaps vacationing on the Moon, consists of a technique that simulates drowning in a controlled environment. The victim is immobilized on his back with the head inclined downward. A cloth is usually placed over the person's face and water is slowly poured over the facial area to force the inhalation of water into the lungs. In contrast to merely submerging the head in water, waterboarding induces the gag reflex and can make the subject believe he is drowning. While the experience may not cause permanent physical damage, it does cause extreme mental distress. The psychological effects can be severe and long lasting. It also carries the risk of extreme pain, damage to

the lungs, brain damage caused by oxygen deprivation, physical injury (including broken bones) from struggling against the restraints, and, occasionally, even death. CIA officers who voluntarily subjected themselves to the technique to test its effects typically lasted 14 seconds before crying for mercy.

ABC News reported that waterboarding was authorized by a 2002 Presidential finding. However, in 2006, CIA Director Michael Hayden requested and received permission from the White House to ban the use of waterboarding in CIA interrogations.[2] Whether or not Mr. Mukasey is willing to admit it, I don't see how anyone who has seriously considered the question could honestly conclude that waterboarding is not torture.

But I am getting ahead of myself; we haven't yet come up with a definition of torture. There are a number of legal definitions of the word in the various treaties and laws which deal with the subject. They vary in one phrase or another, but are pretty much in agreement with the definition contained in the 1987 United Nations Convention Against Torture [3] (UNCAT). It states:

> "Any act, by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of committing, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of or with the consent or the acquiescence of a public official or other person acting in an official capacity."

Let's look at the definition more closely. I would argue that inflicting pain for the sake of punishment, retribution, or discrimination, which are included in the U.N. definition, are not torture as the term is generally used. I am happy that the U.N. Convention prohibits all such activity, but they involve different, although certainly not more justifiable motives. What we are considering here tonight is so-called "interrogational torture." The purpose of interrogational torture is to dominate the person's will in order to force her to disclose information, or to perform some action – making a phone call, or opening a locked safe, for example - which she would otherwise not wish to do.

The definitional requirement that the pain or suffering be "severe" is appropriate, but it does introduce a measure of ambiguity. When Donald Rumsfeld was Secretary of Defense he was asked to approve certain "soft" torture practices, euphemistically dubbed "counter-resistance techniques." (Note that the word "torture" is never used by the government when referring to its own use of such methods.) One of the techniques consisted of having prisoners stand for up to four hours against a wall. Mr. Rumsfeld reportedly asked indignantly, why it should be limited to only four hours, when he himself frequently stood for up to eight hours while working in his office.[4] Of course *he* was free to sit or move around the room or go to the bathroom whenever he chose. Some of the other "soft-torture" techniques on the approval list consisted of sleep-deprivation,

forcing prisoners into stress positions, such as sitting on one's haunches, stripping them naked, questioning them for 28-hours at a time, exploiting phobias, such as fear of dogs, and, of course, the old stand-by, waterboarding. Not surprisingly, Mr. Rumsfeld approved the lot. This was consistent with the Bush Administration's distorted "working definition" of torture, with its extreme interpretation of the requirement of "severity." (More about that later.)

How does one gauge "severity," which is necessarily subjective? A prominent jurist, Richard A. Posner, in his essay on torture, put the problem very neatly:

> " Almost all official interrogation is coercive, yet not all coercive interrogation would be called 'torture'… so what is involved in using the word is picking out the point along the continuum at which the observer's queasiness turns to revulsion." [5]

Obviously there are going to be differences of opinion, depending on one's sensibilities, and perhaps influenced by one's political perspective. The United Nations attempted to resolve semantic debate on the issue; first, when it adopted its Universal Declaration of Human Rights in 1948, and again in the1987 U.N. Convention against torture. Both prohibit not only torture, but "cruel, inhuman or degrading treatment or punishment." So even if the practices approved of by Mr. Rumsfeld , arguably, don't meet the definition of torture, it is disingenuous to argue that they don't come within the ambit of "cruel, inhuman or degrading treatment." We shall re-visit this issue of the subjectivity of the definition of torture when we come to the question of whether the U.S. has officially approved of torture practices since 9/11.

Historical Perspective:

I would like to turn now to torture's historical antecedents. Torture has been a universal experience of mankind, undoubtedly dating back to pre-historic times. But our inquiry focuses on the Western tradition, under which torture, beginning with Roman law, became an essential tool in the European jurisprudential systems. In the Roman Republic, a slave's testimony at trial was only admissible as evidence if the slave had first been tortured; on the assumption that a slave could not be trusted to tell the truth voluntarily.[6] From early Rome to medieval times, torture experienced an ever increasing significance in the adjudication process.

Perhaps the most infamous use of torture was by the Spanish Inquisition, which began in 1252 and lasted until a papal bull was issued in 1816, forbidding its practice in Catholic countries. In the Middle Ages especially, and continuing into the 18th Century, torture was routinely used in criminal investigations, for obtaining confessions and other testimonial evidence for use in judicial trials. It was used by both secular and religious courts, with the latter sometimes employing the more vicious methods - not upon hardened criminals - but upon pious heretics, by even more pious clerics.

The Dominicans, or "black friars," for example, were especially known for their cruel methods. One of the favorite tortures was the *strappado*. This involved tying the victim's hands behind his back with a rope, which was then hung over a pulley or cross-bar. The torturer would suspend the victim in the air by hauling him up by the hands, which invariably, would cause a painful dislocation of the victim's shoulder joints. Sometimes weights were added to the legs, causing hip or knee joint dislocation as well. A more draconian variation of this technique called *squassation*, involved hauling the prisoner up, with weights attached, as previously described, and then dropping the person suddenly, with unimaginably painful and permanently crippling effects.

Other torture methods, which are familiar to most of us by name, included the rack, the thumbscrew, and the boot; and then there were various methods of mutilation, frequently involving the genitals, the details of which I will spare you gentle people. Church law drew the line at bodily mutilation; so if a heretic was particularly recalcitrant, he or she would be turned over to the secular courts, which had no such sanctimonious compunctions.

On the secular side in Europe, the law of torture developed as a branch of the law of evidence, establishing the type of proof necessary to convict someone of a serious crime. Because it was part of the system of jurisprudence, it became known as "judicial torture." The law of judicial torture began in the city-states of northern Italy in the 13th century and spread across Europe along with the rest of Roman law. Torture was reserved for serious crimes for which the penalty was death or maiming. The European law of proof displaced an earlier system, trial by ordeal, which was administered by the Church. Under the earlier system, the person from whom the truth was sought would be subjected to some, albeit stressful or painful, not usually lethal experience. Trial by fire was a popular method of this type. The theory was that if the person came through the experience unscathed, that was a sign of God's judgment that the person was telling the truth. Since God could not be deceived, the system was regarded as foolproof. A similar practice, trial by combat, was used by the Germanic tribes, principally among the nobility.

Eventually, the trial by ordeal was replaced by the law of proof, which required two unimpeachable eye-witnesses to the essential elements of the crime. Without such testimony, an accused who denied the crime could not be convicted. There was, however, one exception: if the accused voluntarily confessed, that was considered sufficiently reliable for conviction. As a corollary of the two-eye-witness rule, circumstantial evidence was never considered adequate for conviction. (CSI would have had no place in medieval Europe.) This restriction created a huge dilemma. Even in situations where the circumstantial evidence cried out "guilt," no conviction could be had without the testimony of unimpeachable eye-witnesses, or the confession of the accused. The result was that the criminal justice system was only effective in situations involving overt crimes or repentant criminals. As you can imagine, in a case where guilt was obvious, but eye-witnesses were lacking, the temptation was great on the part of frustrated prosecutors to coax the accused along toward confessing, by a judicious application of the rack or the screw. Thus the law of judicial torture began.

Curiously, the system of judicial torture was never recognized in England. This was not because Englishmen were more enlightened or more compassionate than their European cousins. It was because the English system of criminal trial was so rudimentary, that torture wasn't necessary. In contrast to the Roman law system of trial by judge, England had trial by jury. The medieval English jury was made up of local residents, who were picked, not because they were impartial, and open-minded, but just the opposite. A "jury of your peers" in 15th century England meant basically your neighbors. It made good sense. Legal scholars in those days would have scoffed at our modern practice of scrupulously excluding from the jury any person who had personal knowledge of the facts or a personal acquaintanceship with the accused or the victim. As a result of the jury system, torture as a means of getting a conviction was never adopted in England, except for a brief period during the reign of Elizabeth I, when torture was tried as an experiment, and then soon abandoned.

The American colonies, which modeled their jurisprudence on the English common law, never adopted torture. When America became a nation, the fundamental right to be free of torture was underscored by the Fifth Amendment privilege against self-incrimination and the Eighth Amendment's proscription against cruel and inhuman punishment. So it was then; let's now look briefly at the modern law on torture.

Modern Law on Torture

On December 10, 1948, as a reaction to the horrors perpetrated in World War II, the United Nations General Assembly adopted the Universal Declaration of Human Rights. Article 5 of that document states: "No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment." Since that time, a number of international treaties have been adopted prohibiting torture and other degrading practices. The principal one was an overhaul of the Geneva Conventions, in 1949. Of relevance to the torture issue were two new sections, GC III and GC IV. Section III deals with POW's. Section IV deals with non-combatants. Under GC III the protection for prisoners-of-war is very broad. It not only prohibits torture, but "any other form of coercion" – including threats, insults, or "unpleasant or disadvantageous treatment." However, by interpretation (at least by the U.S. and its close allies) the Geneva Conventions do not apply to "unlawful combatants." (More about that issue when we discuss current U.S. practices on torture.) The other principal international treaty is the United Nations Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment of 1987, (UNCAT), which was already discussed earlier in connection with the definition of torture. UNCAT has since been ratified by 130 countries. The United States finally got around to ratifying the treaty in 1994. In the same year, pursuant to the requirements of UNCAT, the Congress passed legislation in effect making a violation of the torture provision of UNCAT a felony.[7] How the restrictions on torture have played out in the real world of post-9/11, however, is a different story.

Current U.S. Policy onTorture.

Guantanamo Bay is a scenic stretch of coastline along the southern shore of Cuba. After American and Cuban forces caused Spain to abandon the island in 1898, the American Navy continued to occupy a forty-five mile strip of land along this beach.[8] "Gitmo," as it has been nick-named by the military, was a typical naval base until January 10, 2002, when the U.S. decided to begin moving prisoners there from Afghanistan, and the prison authority was shifted from the Navy to the joint control of all the U.S. military services. In a news conference on that same day, Defense Secretary Rumsfeld announced that the prisoners transferred to Guantanamo were considered "unlawful combatants," and, as such, not entitled to the protection of the Geneva Conventions. This meant, in the U.S. Government's view, that the prisoners could be held incommunicado and interrogated for as long as the war on terror lasted - i.e. indefinitely - without counsel, or even a hearing to determine if they were in fact unlawful combatants. The international response was a chorus of condemnation – from the United Nations, the European Union and the Organization of American States. But, the detentions drew little notice, much less criticism, within the United States – at least not initially. To many Americans, still angry after 9/11, the prisoners at Guantanamo were presumed terrorists (although there was never a judicial finding of that fact). Why should terrorists be entitled to any rights?

Eventually the U.S. Supreme Court was drawn into the controversy. Three lawsuits had been filed on behalf of detainees at Guantanamo.[1] The Government's position in these lawsuits was that the plaintiffs, as "unlawful combatants," were not "criminals," and therefore not subject to the protection of the Constitution and the criminal justice laws; nor were they "prisoners of war," entitled to the protections of the Geneva Convention, which would have prohibited the Government from interrogating them. In fact, according to the Government, the plaintiffs weren't entitled to anything – they weren't even entitled to file a lawsuit to resolve these questions.

In the oral argument before the Supreme Court in *Padilla* (one of the three cases), Justice Ginsberg, obviously bothered by the White House's assertion of virtually unlimited executive authority over these detainees, wanted to know what limits, if any, there were on executive authority. She asked Asst. Atty. General Clement: "What inhibits [executive power]? If the law is what the executive says, it is whatever is 'necessary and appropriate' in the executive's judgment. So what is it that would be a check against torture?....Suppose the executive says, 'mild torture, we think, will help get this information.'… Some systems do that to get information." Clement responded, with a touch of indignation: "Well, *our* executive doesn't."

About eight hours after that exchange between Ginsberg and Clement, the CBS News program *60 Minutes II* showed photographs of U.S. Army personnel engaging in

[1] Cite Hambdi, Rasul and Padilla.

physical and sexual abuse of prisoners at Abu Ghraib prison. The photos, now familiar to us all, showed naked Iraqi prisoners forced into a human pyramid, and another showed a prisoner standing on a box, with a hood over his head, and electric wires attached to his body. An attorney for the Guantanamo defendants later recalled, "These photos proved to be the most powerful amicus brief of all." The Administration was handed a humiliating defeat by the Supreme Court in all three of the Guantanamo cases.

The *60 Minutes* expose touched off months of intense public attention to the question of torture by American personnel in Iraq and Guantanamo. Investigations revealed extensive abuse of prisoners in Iraq, not only by low-level military types, but, even more shocking, support for such tactics at the highest levels of the Bush Administration. Then, in the midst of this inquiry, there came to light the most sensational evidence of executive complicity: the "torture memo."

In the summer of 2002, Alberto Gonzales, then White House Counsel, asked the Justice Department to prepare a paper on the question of whether U.S. personnel involved in the war on terror were constrained by U.S. law, which forbade "cruel, inhuman or degrading treatment," either inside or outside the United States. An Orwellian-like response came a few months later in the form of a memo signed by Jay Bybee and John Yoo, two senior officials in the Justice Department. The "tortured" definition of torture – if I may use that phrase –was narrower than Bill Clinton's definition of "sex." Torture consisted of "severe physical or mental pain or suffering." "Physical pain amounting to torture, according to the memo, "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture…it must result in significant psychological harm of significant duration, e.g. lasting for months or even years."[9] Additionally, according to the memo, the President had inherent over-riding authority, which trumped any federal statute, to direct any interrogation technique which he felt was necessary. With this kind of attitude prevailing in the top echelon of the executive administration, it is little wonder that a "no holds barred" policy filtered down through the military ranks to the lowest levels of personnel at Abu Ghraib, and probably Guantanamo as well.

The Congress eventually joined in the fray over the issue of the limits of executive power. Senator John McCain introduced a bill in October of 2005, the so-called "McCain Amendment," which (1) prohibits the inhumane treatment of prisoners, including detainees at Guantanamo and (2) requires military interrogations to be performed according to the Code of Military Justice. Initially, President Bush threatened to veto the bill. However, the bill, as finally passed, included another amendment, the Graham-Levin Amendment, which pretty much eviscerated the McCain Amendment. [10] The Graham-Levin Amendment permits the Defense Department to consider evidence obtained through torture of detainees at Guantanamo and also expands the limits on the availability of habeas corpus to detainees, which leaves them with no legal recourse if they are tortured. President Bush was satisfied with the bill in its final form and signed it, with, of course, his usual signing statement, reserving the right to decide in any specific case, whether his implied executive powers would over-ride the legislation.

It is not just the U.S. Military that has been caught using illicit torture. The CIA and the FBI have flirted with the use of torture for years. The CIA's enthusiasm for torture has waxed and waned in resonance to the White House's reactions to adverse Congressional and media attention. The Justice Department declared torture to be abhorrent in a legal opinion issued in December of 2004. But soon after, as we have already seen, the secret Gonzales opinions were issued, approving the use of painful physical and psychological techniques, including head-slapping, water-boarding, and frigid temperatures. Later that year, the Justice Department also declared that none of the CIA interrogation methods violated any laws. After the Supreme Court ruled in 2006 that the Geneva Conventions applied to prisoners who belonged to Al Qaeda, President Bush for the first time acknowledged the CIA's use of secret jails and ordered their prisoners transferred to Guantanamo Bay. But in July of that same year, President Bush signed a new executive order authorizing the use of so-called "enhanced" interrogation techniques – the details of which remain secret. Unnamed officials, quoted in a New York Times article, in October of 2007, stated that the CIA is again holding prisoners in "black sites" overseas.[11]

The story of the current U.S. policy on torture would not be complete without mention of another covert practice; one with the innocuous sounding name of "rendition." This term refers to the practice of one country, which has legal or political restrictions on "rough interrogation" (say, the United States) handing over a prisoner to another country, which has no such restrictions (say, Egypt) to do the dirty work. As one American official put it, off the record, "We don't kick the [blank] out of them, we send them to other countries, so they can kick the [blank] out of them."[12] Rendition for the purpose of interrogation which includes torture, or is likely to include torture is prohibited by U.S. law as well as by UNCAT, the U.N. treaty against torture. Nevertheless, according to a report issued jointly by N.Y.U. Law School and the New York Bar Association, an estimated 150 people have been rendered, presumably illegally, by the U.S. since 9/11. Of course this is only an estimate – the numbers may be much larger - but the CIA steadfastly refuses to disclose any statistics.[13] This brings us to the final question of the evening.

<u>What Should U.S. Policy on Torture be - Morally, Ethically and Legally?</u>

If asked whether torture can ever be considered morally or ethically justified, ones initial reaction might be: "Of course not. How could anyone consider torturing an innocent person? " But what if the person is not innocent… or what if the person is innocent, but by torturing him, you could save hundreds of lives? The question was trenchantly posed over 100 years ago by Fyodor Dostoevsky in the classic novel, *Brothers Karamazov*. Ivan Karamazov, taunting his brother, Alyosha, puts the question to him:

> "Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature ─ that little

> child beating its breast with its fist, for instance - and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions? Tell me, and tell the truth."

Now, over one hundred years later, the argument over this moral dilemma goes on. A more modern statement of the problem is known as the "ticking bomb scenario" among philosophers and ethicists who enjoy debating this kind of thing. It goes like this. A group of terrorists plants a nuclear device somewhere in New York City. The police through a wire tap learn of the plot, and that the device is timed to go off in 24 hours. However the police don't know where the device has been planted. There is a raid and all of the terrorists are killed or escape – except one, who is captured. He refuses to disclose the whereabouts of the bomb. If the device isn't located and disarmed within 24 hours, hundreds, perhaps thousands, of people will die. The terrorist refuses to disclose its whereabouts. Is torture morally acceptable in this situation?

I'm sure that there will never be complete agreement on this question. But I would guess that a large number of people in this Country, perhaps a majority, would find it morally acceptable to torture a terrorist in order to save hundreds of lives.. However, I also would guess that the number of people approving torture would drop dramatically in response to Karamazov's question. It is my belief (or at least hope) that most people would stop at torturing and killing an innocent child, under any circumstances. Fortunately, the Karamazov question is impossibly theoretical, so no one will ever be forced to make that decision. As a matter of fact, the ticking bomb scenario also seems extremely unlikely to occur. Still, plausible examples of situations where torture might seem acceptable are easy to conjure up. Imagine, if you will, a very hot summer afternoon. A man flees from a 7/11 store he has just robbed. A woman has just pulled up her car in front of the store, in order to run in and pick up a quart of milk, with her infant asleep in the back seat. The robber tears open the car door, pulls the woman out of the car, jumps in the driver's seat and takes off, unaware of the infant in the back seat. Later the robber is apprehended, after having abandoned the car in a wooded area several miles from the site of the 7/11 store. Fearing a kidnapping charge, the robber refuses to disclose the location of the car with the child in it. By this time, the temperature has climbed to over 100 degrees. If the infant in the car is not found soon, he will undoubtedly succumb to hyperthermia. Would torture be morally or ethically acceptable in this situation? Many would say yes.

My opinion is that there are undoubtedly circumstances where at least some form of non-lethal torture would be morally or ethically acceptable. But at the same time, I would be unalterably opposed to the legalization of torture. It is an important distinction. For an official to face a specific situation and then make a moral or ethical decision about whether torture is appropriate in that instance - irrespective of its legality – presents much less of a danger to the public good than passing a law which necessarily has to articulate a general principle as to when torture is permissible. Moral decisions are precise. Legal enactments are more blunt instruments. The public official who makes a moral decision to use torture, knows that he faces consequences. If the torture is illegal he may put in prison; if the victim dies, he may even receive the death penalty. Yet, if the

consequences of not using torture e.g. in the ticking bomb situation, are even less acceptable to the official, he will do so, despite personal consequences. A court or a jury might acquit the official if the torture seemed reasonable under the circumstances, The Government might even give him a medal. But the important thing is that the official who is faced with that decision whether or not to torture knows that he remains accountable for his actions. This accountability, I submit, would be a significant deterrent to the widespread use of torture. However, if torture is legalized, the temptation to twist and expand the law by interpretation is too great. We have seen what has already happened in this Country since 9/11.

Alan Dershowitz, the noted law professor at Harvard Law School, had a different solution to the problem. [14] He argues that when confronted with the ticking bomb situation, the law should provide for a procedure for the government to obtain a torture warrant from a judicial body upon proof of extraordinary circumstances of imminent disaster. This would be somewhat analogous to obtaining a search warrant. Dershowitz came up with the idea of warrants while he was teaching in Israel. In 1987, after it became public knowledge that the Israeli General Security Service (GSS) was using force in interrogating Palestinians suspected of terrorist activity, a commission of inquiry was appointed, headed by former Israeli Supreme Court Justice, Moise Landau. The Landau Commission issued a report finding that the use of moderate force by the GSS was permissible, under the criminal law defense of necessity. Briefly, the defense of necessity is based on the principle that if torture is the only way in which to save other lives, e.g. the ticking bomb situation, then it is permissible to use torture. The Landau Commission report was very controversial among the Israeli people. In the midst of this controversy, Dershowitz waded in with his torture warrant theory. Eventually, the legality of the GSS methods came before the Israeli Supreme Court. In 1999, the Court ruled that the use by the GSS of moderate force as approved by the Landau Commission was illegal. The decision, however, left the door slightly ajar about the defense of necessity, holding that while the necessity defense does not bestow authority to torture, the opinion was not meant to rule out the necessity defense and other criminal law defenses to the crime of torture completely. However, the Dershowitz warrant solution never gained any traction in Israel. or elsewhere, for that matter.

In the final analysis, legalized torture cannot be tolerated by society. It threatens the social contract between a government and its people. In essence, torture aims at an eradication of the victim's individual autonomy. Given the deep significance of human autonomy in our Western culture, torture must be viewed as intolerable – even apart from the physical suffering it causes. It not only dehumanizes the victim by robbing her of her will, but at the same time, it brutalizes and desensitizes the torturer. The result is that the humanity of both the torturer and the victim are diminished. Inevitably, torture requires the blunting of the torturer's capacity to imagine the suffering of the victim. The pain of the tortured is not our pain because the tortured is somehow less than human. In this way the natural instinct for empathy and compassion which one experiences when seeing a person suffer is blocked. This deadening of the imagination occurs not only in the torturer, but in those who see what is going on and do nothing and those who are deliberately blind to what is going on. In this way, the whole social fabric becomes

corrupted. The societal acceptance of torture leads, over time, to a moral callousness which devalues all human worth. Carried to the extreme, e.g. in Nazi Germany, the Country loses its moral compass. Everything becomes acceptable, in the name of national interest. As the Israeli Supreme Court observed, in rejecting torture, " if the price of security is the loss of human dignity that is too high a price to pay. "
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[1] *Torture, A Collection*, p. 5 (Oxford University Press, 2004.)
[2] http://en.wikipedia.org/wiki/Waterboarding
[3] Officially called The United Nations Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment
[4] http://www.prisonplanet.com/articles/may2007/020507Rumsfeld.htm
[5] Posner, Torture, *Terrorism and Interrogation*, included in *Torture, A Collection, supra,* at p. 291.
[6] http://en.wikipedia.org/wiki/torture
[7] 18 USC § 2340.
[8] The information on Guantanamo and Abu Ghraib in this section was drawn heavily from Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (Doubleday, 2007) chapt. 18.
[9] Quoted in Toobin, supra, at 233.
[10] Human Rights News Landmark Torture Ban Undercut. http://hrw.org/english/docs/2005/12/16/usdom12311.htm
[11] http//www.nytimes.com/2007/10/04/washington/04interrogate.html?_r=1&th=&emc=th&…
[12] *Torture, A Collection*, p. 26 fn.4
[13] *Outsourcing Torture*, New Yorker Magazine, 2/14/05, archived at www.newyorker.com/archive/2005/02/14/050214fa_fact6
[14] Dershowitz , *Tortured Reasoning*, included in *Torture, A Collection, supra,* , p. 257