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John T. Parry

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*JOHN T. PARRY**

I. THE REASONABLE BOUNDARIES OF POLITICAL DEBATE

For most of the twentieth century, American political discourse did not pay a great deal of attention to torture. Most participants in and observers of American political life generally assumed that—or at least acted as if—the United States did not torture and that, if torture did happen under American auspices, it was isolated and aberrational. Presidential candidates did not need to have a detailed policy position on torture. It was enough to affirm support for human rights, which easily encompassed opposition to torture in those places where it lingered.[1] No serious political figure openly and publicly advocated the use of torture.

Thus, in October 1999, the United States submitted its Initial Report to the U.N. Committee Against Torture. The Initial Report asserted that "[t]he United States has long been a vigorous supporter of the international fight against torture," and it noted that "U.S. representatives participated actively in the formulation of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or

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* Associate Dean of Faculty and Edward Brunet Professor of Law, Lewis & Clark Law School. My thanks to the editors of the Tennessee Law Review for inviting me to take part in this symposium, and to Dashiell Farewell for research assistance.

1. *See, e.g.*, *2000 Democratic Party Platform*, THE AMERICAN PRESIDENCY PROJECT (Aug. 14, 2000), http://www.presidency.ucsb.edu/ws/?pid=29612 ("We will continue to press for human rights, the rule of law, and political freedom."); *2000 Republican Party Platform*, THE AMERICAN PRESIDENCY PROJECT (July 31, 2000), http://www.presidency.ucsb.edu/ws/?pid=25849 ("Republicans know that the American commitment to freedom is the true source of our nation's strength.").

Punishment . . . and in the negotiation of the Convention Against Torture."[2]

The Initial Report cautioned that "[n]o government . . . can claim a perfect record" and that "[a]buses occur despite the best precautions and the strictest prohibitions."[3] It specifically mentioned domestic concerns about police violence and conditions in prisons.[4] Nonetheless, the Initial Report had no difficulty announcing an absolute rejection of torture:

> Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension. The United States is committed to the full and effective implementation of its obligations under the Convention throughout its territory.[5]

The United States, in brief, talked the talk of an anti-torture nation and asserted that the prohibition against torture was written into its fundamental legal, political, and perhaps even moral commitments.

Two years later, after the September 11, 2001 attacks, federal officials, politicians, journalists, and academics were openly discussing the possibility of coercive interrogation and torture.[6]

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2. U.S. Dep't of State, Bureau of Democracy, H.R., and Lab., Initial Rep. of the United States of America to the U.N. Committee Against Torture ¶ 5 (Oct. 15, 1999).

3. *Id.* ¶ 7.

4. *Id.*

5. *Id.* ¶ 6. Subsequent paragraphs carry on the general theme of repudiation of torture and continued commitment to eradication of abuses when they occur.

6. *See* Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 2001, at 45 (advocating for some degree of torture to "jump-start the stalled investigation of the greatest crime in American history"); Alan M. Dershowitz, *Is There a Torturous Road*

Writing in 2002, Slavoj Žižek asserted, in response to these early discussions, that "legitimization of torture as a topic of debate changes the background of ideological presupposition and options much more radically than its outright advocacy," and he warned, "[t]he idea that, once we let the genie out of the bottle, torture can be kept at a 'reasonable' level is the worst liberal illusion."[7] Although the torture debate that began fifteen years ago has proven a bit more complicated than Žižek's prediction, he was indisputably prescient.

At first the public debate and the development of policy overlapped, although they were not entirely consistent. Very few mainstream politicians or government officials openly advocated torture as a general policy in the months and years after 9/11, but they were willing to endorse toughness, enhanced techniques, and "gloves [coming] off."[8] Many participants in these debates suggested that coercion could be acceptable in extraordinary circumstances (often referred to as "ticking bomb" situations) even if torture was forbidden as a general rule.[9] In the months after the attacks, the

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to Justice?, L.A. TIMES, Nov. 8, 2001, at B.19 (discussing the possibility of judge-issued "torture warrants" that "authoriz[e] the FBI to employ specified forms of non-lethal physical pressure"); Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 20, 2001, at A06 (noting that some FBI and Justice Department investigators were calling for setting aside suspects' civil liberties in stalled interrogations); Jim Rutenberg, *Torture Seeps Into Discussion by News Media*, N.Y. TIMES, Nov. 5, 2001, § C, at 1 (detailing several journalists' comments on the validity of torture as an investigative course of action).

7. SLAVOJ ŽIŽEK, WELCOME TO THE DESERT OF THE REAL 104 (2002).

8. *See, e.g.*, John Barry, Michael Hirsh, & Michael Isakoff, *The Roots of Torture*, NEWSWEEK, May 2004, at 26 (quoting congressional testimony of Cofer Black, former director of the Central Intelligence Agency's counterterrorist unit: "'After 9/11 the gloves came off.'"). For an academic defense of torture during this period, see generally MIRKO BAGARIC & JULIE CLARKE, TORTURE: WHEN THE UNTHINKABLE IS MORALLY PERMISSIBLE (2007).

9. *See* Jean Bethke Elshtain, *Reflections on the Problem of 'Dirty Hands,'* *in* TORTURE: A COLLECTION 77, 87 (Sanford Levinson ed., rev. ed. 2006) (arguing that the norm against torture must remain, that it might have to be broken in extreme circumstances, and that "the one who broke it for a strong reason must nevertheless make amends in some way"); Oren Gross, *The Prohibition on Torture and the Limits of Law*, *in* TORTURE: A COLLECTION, *supra*, at 229, 244 (similarly arguing the ban on torture should remain but that in rare circumstances officials should disobey the law, use torture, and seek "ex post ratification"); Charles Krauthammer, *The Truth About Torture*, *in* TORTURE: A COLLECTION, *supra*, at 307, 309 (agreeing torture should be illegal in most cases but suggesting it should be used in some situations on captured terrorists who have important information); Richard A. Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE: A COLLECTION, *supra*, at 291, 296 (asserting that "customary legal prohibitions" against torture should stand alongside an expectation

Department of Justice's Office of Legal Counsel began preparing memoranda that effectively authorized the use of numerous coercive interrogation methods against people suspected of having knowledge about past or future terrorist activities.[10] In other words, the memoranda authorized coercion in circumstances that went beyond the ticking bomb scenario and diverged from most of the public debate.

Under the shield of these legal authorizations, some CIA and Department of Defense officials began to use mentally and physically violent interrogation tactics—torture, under any fair definition of the word[11]—on people detained during military and counter-terror operations. Sometimes, U.S. personnel used coercion in circumstances that were not authorized by the new interrogation policies, and people were detained in conditions that, at best, approximated the harshest and most controversial forms of domestic imprisonment.[12] The genie

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that such prohibition will not be enforced against officials in "extreme circumstances"); Dershowitz, *supra* note 6, at B.19 (suggesting government officials should be able to seek torture warrants from judges); John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 747–48 (2002) (asserting torture is illegal but suggesting officials on trial for torture should be allowed to raise the necessity defense). For critical analysis of the ticking time bomb scenario, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440–52 (2005) (referring to the ticking-time bomb scenario as "an intellectual fraud") and J. JEREMY WISNEWSKI, UNDERSTANDING TORTURE 128–48 (2010) (providing an extensive critique of the "unrealistic" ticking time bomb scenario).

10. The Office of Legal Counsel memoranda from 2002, as well as those from 2004 and 2005, are collected in THE TORTURE MEMOS (David Cole ed., 2009).

11. For the law of torture, including its definition under international law, see Part II, *infra*.

12. For a narrative of the development and implementation of the torture and detention policies, see JOHN T. PARRY, UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY 166–95 (2010) [hereinafter Parry, UNDERSTANDING TORTURE]. For collections of documents that detail these practices and the structures that quickly grew up around them, see generally THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (containing legal memoranda spanning 2001 to 2004 "that sought to argue away the rules against torture") and JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE (2007) (containing a collection of legal memoranda and witness statements addressing coercive interrogative policies). For discussion of documents that became available more recently, see Sheri Fink, James Risen, & Charlie Savage, *C.I.A. Torture Detailed in Newly Disclosed Documents*, N.Y. TIMES (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/us/politics/cia-torture.html (discussing the recent release of documents concerning the C.I.A.'s obsolete torture program). For discussion of the impact of this treatment on its victims, see WISNEWSKI, *supra* note 9, at 50–91 (noting that torture destroys all things "essential to the human condition")

was out of the bottle and growing.

Then, in the spring of 2004, the Abu Ghraib scandal erupted. News reports, accompanied by photographs, demonstrated that U.S. soldiers had abused Iraqi prisoners. Information continued to surface about detention conditions and abuses in other locations, and Congress held hearings[13] and even passed legislation.[14] Although the administration's policies and practices had defenders,[15] human rights groups and others were able to re-assert an anti-torture position that gained ground across the political spectrum.[16] Abusive conduct continued to take place at least until September 2006, but in that month President George W. Bush transferred the last fourteen men in CIA custody to Guantánamo Bay Naval Base and the Department of Defense issued a new field manual on interrogation that expressly prohibited many of the interrogation methods that had emerged and flourished over the previous five years.[17] Whether or not some abuses continued, torture had stopped expanding. Perhaps the genie had even been forced back into the bottle.

Despite the existence of torture proponents, it was not at all clear after Abu Ghraib that torture or coercion had become a legitimate issue of debate or that ideological presuppositions had changed. During the 2004 presidential campaign, the Bush administration successfully argued that the Abu Ghraib scandal was an aberration,

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and Matt Apuzzo, Sheri Fink, & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES, Oct. 8, 2016, https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html (documenting torture victims' "long lasting psychological harm").

13. *E.g.*, *Rumsfeld Testifies Before Senate Armed Services Committee*, WASH. POST (May 7, 2004, 3:28 PM), http://www.washingtonpost.com/wp-dyn/articles/A8575-2004May7.html.

14. *E.g.*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001, 119 Stat. 2739 (2005).

15. *See* Sanford Levinson, *In Quest of a "Common Conscience": Reflections on the Current Debate About Torture*, 1 J. NAT'L SECURITY L. & POL'Y 231, 234 (2005) (noting these arguments).

16. *E.g.*, "The Road to Abu Ghraib," HUMAN RIGHTS WATCH (June 8, 2004), https://www.hrw.org/report/2004/06/08/road-abu-ghraib.

17. Parry, UNDERSTANDING TORTURE, *supra* note 12, at 199. For a narrative of the events in this paragraph, see *id.* at 178–99. For discussion of the Field Manual, see Beth Van Schaack, *The Torture Convention & Appendix M of the Army Field Manual on Interrogations*, JUST SECURITY (Dec. 5, 2014, 12:34 PM), https://www.justsecurity.org/18043/torture-convention-appendix-army-field-manual-interrogations/.

not a reflection of U.S. policy,[18] and Democrats did not make it a central issue in Senator John Kerry's unsuccessful campaign.[19] By 2008, however, torture was a significant issue for both presidential campaigns. The Democratic candidate, Illinois Senator Barack Obama, strongly condemned torture.[20] The 2008 Democratic Party platform declared, "To empower forces of moderation, America must live up to our values, respect civil liberties, reject torture, and lead by example."[21] For his part, the Republican nominee, Arizona Senator John McCain, had suffered torture in the Vietnam War, and he had a record of speaking out against it.[22] Yet the Republican Party platform took a more ambiguous and apparently more accommodating position: "In dealing with present conflicts and future crises, our next president must preserve all options. It would be presumptuous to specify them in advance and foolhardy to rule out any action deemed necessary for

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18. John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, *in* TORTURE: A COLLECTION, *supra* note 9, at 106–07 [hereinafter Parry, *Escalation and Necessity*].

19. Levinson, *supra* note 15, at 237. Although it was not a major campaign issue in 2004, the Democratic platform spoke out against torture and abuse of prisoners: "We believe that upholding international standards for the treatment of prisoners, wherever they may be held, advances America's national security, the security of our troops, and the values of our people. And we believe torture is unacceptable." *2004 Democratic Party Platform*, THE AMERICAN PRESIDENCY PROJECT, (July 27, 2004), http://www.presidency.ucsb.edu/ws/?pid=29613. The Republican platform asserted President Bush's foreign policy and anti-terror successes but did not acknowledge, defend, or apologize for torture or abuse of prisoners. *2004 Republican Party Platform: A Safer World and a More Hopeful America*, THE AMERICAN PRESIDENCY PROJECT (Aug. 26, 2004), www.presidency.ucsb.edu/papers_pdf/25850.pdf.

20. *See, e.g.*, Barack Obama, *Remarks in Denver: "The Past Versus the Future,"* THE AMERICAN PRESIDENCY PROJECT (Jan. 30, 2008), http://www.presidency.ucsb.edu/ws/index.php?pid=77031 ("It's time to restore our moral leadership by rejecting torture without equivocation.").

21. *2008 Democratic Party Platform: Renewing America's Promise*, THE AMERICAN PRESIDENCY PROJECT (Aug. 25, 2008), http://www.presidency.ucsb.edu/ws/?pid=78283.

22. Michael Scherer, *Has McCain Flip-Flopped on Torture?*, TIME (Apr. 10, 2008), http://content.time.com/time/politics/article/0,8599,1729891,00.html. McCain has received criticism for not speaking out unequivocally against all kinds of coercive interrogation, but he consistently has opposed torture and inhumane treatment. *Id.* For a defense of his positions, see *id.* For criticisms, see Andrew Cohen, *John McCain's Spotty Record on Torture*, THE ATLANTIC (May 13, 2011), https://www.theatlantic.com/politics/archive/2011/05/john-mccains-spotty-record-on-torture/238842/; Marty Lederman, *Senator McCain Condemns Torture—But Votes Against the Bill that Would Prevent It*, BALKINIZATION (Feb. 13, 2008), https://balkin.blogspot.com/2008/02/senator-mccain-is-against-torture-but.html.

our security."[23]

After he took office, President Obama pointedly issued several executive orders that fulfilled his commitment to repudiating the Bush Administration's interrogation and detention policies.[24] Ultimately, however, the Obama administration did not take any serious steps to hold anyone accountable for the development and implementation of a torture policy or even to provide a complete official public record about that policy and its implementation.[25] Still, in 2012, the Democratic Party platform observed, in a passage titled "staying true to our values at home," that "the President banned torture without exception in his first week in office."[26] The intended

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23. *2008 Republican Party Platform*, THE AMERICAN PRESIDENCY PROJECT (Sept. 1, 2008), http://www.presidency.ucsb.edu/ws/?pid=78545.

24. Scott Shane, Mark Mazzetti, & Helene Cooper, *Obama Reverses Key Bush Security Policies*, N.Y. TIMES (Jan. 23, 2009), http://www.nytimes.com/2009/01/23/us/politics/23obama.html.

25. Kenneth Roth, *Barack Obama's Shaky Legacy on Human Rights*, FOREIGN POLICY (Jan. 4 2017), http://foreignpolicy.com/2017/01/04/barack-obamas-shaky-legacy-on-human-rights/. During the Bush Administration, several military personnel were court-martialed for their conduct at Abu Ghraib, and a CIA contractor was convicted of assault for his role in killing a person held in custody. Clyde Haberman, *A Singular Conviction Amid the Debate on Torture and Terrorism*, N.Y. TIMES: RETRO REPORT (Apr. 19, 2015), https://www.nytimes.com/ 2015/04/20/us/a-singular-conviction-amid-the-debate-on-torture-and-terrorism.html?_r=0. No U.S. official was charged during the Obama administration. Roth, *supra*. For a comprehensive call for accountability, issued in 2015, seven years into the Obama presidency, see generally HUMAN RIGHTS WATCH, NO MORE EXCUSES: A ROADMAP TO JUSTICE FOR CIA TORTURE (2015), https://www.hrw.org/sites/default/files/report_pdf/us1115web_2.pdf. The Senate's Select Committee on Intelligence prepared an extensive report on the CIA's activities but only released a redacted executive summary to the general public. Roth, *supra*; *see also* S. SELECT COMM. ON INTELLIGENCE, 113TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (Unclassified Dec. 3, 2014), https://permanent.access.gpo.gov/gpo53907/sscistudy1.pdf. The full version remains classified and the Obama administration agreed to preserve a copy only in its waning days, and even then, the Obama administration determined that the full report must remain secret for at least twelve years. The Editorial Board, *Declassify the Senate Torture Report*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/ 2016/12/12/opinion/preserve-the-senate-torture-report-dianne-feinstein.html. Note that the Trump administration has returned the copies of the report that remained in the possession of the exeutive branch. *See* Mark Mazzetti, et al., *Trump Administration Returns Copies of Report on CIA Torture to Congress*, N.Y TIMES (June 2, 2017), https://www.nytimes.com/2017/06/02/us/politics/cia-torture-report-trump.html?_r=0.

26. *Moving America Forward: 2012 Democratic National Platform* 67 (Sept. 4, 2012), https://assets.documentcloud.org/documents/422016/2012-democratic-national-platform.pdf.

message was clear: torture was archaic and a thing of the past. Žižek's fears, perhaps, were overblown.

But not so fast. In contrast to the Democrats, the 2012 Republican platform stressed "the necessity for the President to have the tools to deal with [terrorist] threats[,]"[27] a position that was general enough to accommodate torture. According to the New York Times, the contenders for the Republican nomination were "divide[d] on waterboarding: A few say it is torture and illegal, some say the United States should not do it but it may not be torture, and others say it is legal and should be used."[28] The ultimate nominee, former Massachusetts Governor Mitt Romney, stated he would bring back "enhanced interrogation techniques which go beyond those that are in the military handbook . . . ," and he asserted that waterboarding is not torture.[29] Yet Romney lost, and as late as June 2015, and despite the uncertainties of their party's position, thirty-two Republican Senators joined every Senate Democrat in a vote to condemn torture.[30]

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27. *We Believe in America: 2012 Republican Platform*, THE AMERICAN PRESIDENCY PROJECT (Aug. 27, 2012), http://www.presidency.ucsb.edu/ws/?pid=101961. More fully stated:

> We affirm the need for our military to protect the nation by finding and capturing our enemies and the necessity for the President to have the tools to deal with these threats. As history has sadly shown, even our fellow citizens may rarely become enemies of their country. Nevertheless, our government must continue to ensure the protections under our Constitution to all citizens, particularly the rights of habeas corpus and due process of law . . . .
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> . . .
>
> We will employ the full range of military and intelligence options to defeat Al Qaeda and its affiliates who threaten not just the West but the community of nations. We will have a comprehensive and just detainee policy that treats those who would attack our nation as enemy combatants.

28. Alicia DeSantis et al., *Republican Presidential Candidates on the Issues: Torture, Interrogation and Detainees*, N.Y. TIMES (Mar. 4, 2017). http://www.nytimes.com/elections/2012/primaries/issues.html#issue/interrogation-detainees.

29. Charlie Savage, *Election to Decide Future Interrogation Methods in Terrorism Cases*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/us/politics/election-will-decide-future-of-interrogation-methods-for-terrorism-suspects.html.

30. Emmarie Huetteman, *Senate Votes to Turn Presidential Ban on Torture into Law*, N.Y. TIMES (June 16, 2015), https://www.nytimes.com/ 2015/06/17/world/senate-

Was torture a legitimate issue, or not? The answer would soon be clear.

During the 2016 presidential primaries, nearly every serious Republican candidate for President endorsed the use of waterboarding and other coercive interrogation techniques, even if many were unwilling to embrace torture by name.[31] And, although thirty-two Republican Senators voted in June 2015 to condemn torture, twenty-one others voted against the measure.[32] By contrast, the three contenders for the Democratic nomination disavowed torture.[33] In July 2016, shortly before the party conventions, a group

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votes-to-turn-presidential-ban-on-torture-into-law.html (discussing passage of an amendment to the National Defense Authorization Act to forbid the use of torture).

31. *See* Elizabeth Grimm Arsenault, *Donald Trump and the Normalization of Torture*, LAWFARE (Nov. 13, 2016, 10:02 AM), https://www.lawfareblog.com/donald-trump-and-normalization-torture (discussing Donald Trump's endorsement of waterboarding as a method of enhanced interrogation and as punishment); Michael Crowley, *On Torture, Cruz Stands Alone*, POLITICO (Jan. 21, 2016, 5:07 AM), http://www.politico.com/story/2016/01/ted-cruz-republicans-torture-217976 ("Among the leading candidates, only Cruz has argued clearly against torture . . . ."); Phillip Elliott, *Jeb Bush Is Not the Only 2016 Candidate Open to Torture*, TIME (Aug. 14, 2015, 6:24 PM), http://time.com/3998483/jeb-bush-republicans-torture/ (discussing Jeb Bush's stance on enhanced interrogation techniques); S.M., *The Republicans and Waterboarding: Presidential Candidates Compete Over Their Embrace of Torture*, THE ECONOMIST: DEMOCRACY IN AMERICA (Feb. 13, 2016), http://www.economist.com/blogs/democracyinamerica/2016/02/republicans-and-waterboarding (discussing Donald Trump's enthusiasm for waterboarding and enhanced interrogation compared to Ted Cruz and Marco Rubio's more "limited embrace" of the techniques); Team Fix, *Transcript of the New Hampshire GOP Debate, Annotated*, WASH. POST: THE FIX (Feb. 6, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/06/transcript-of-the-feb-6-gop-debate-annotated/?utm_term=.8073e6476e91 (remarks of candidates Cruz, Rubio, and Trump regarding waterboarding).

32. Julian Hattem, *Senate Votes to Ban Use of Torture*, THE HILL (Jun. 16, 2015, 12:05 PM), http://thehill.com/policy/national-security/245117-senate-votes-to-permanently-ban-use-of-torture (highlighting several prominent Republicans who opposed the amendment to the National Defense Authorization Act). During roughly the same period, a former Bush administration official who writes a regular column for the Washington Post asserted that Democrats had lost the torture debate. Marc A. Thiessen, *Democrats Lose the 'Torture' Debate*, WASH. POST (Jan. 5, 2015), https://www.washingtonpost.com/opinions/marc-thiessen-democrats-lose-the-torture-debate/2015/01/05/5e5347ca-94da-11e4-927a-4fa2638cd1b0_story.html?utm_term=.3c0e22fb963c.

33. *See* Amy Chozick, *Hillary Clinton Vows to 'Defeat Terrorism' but Cautions About Shutting Borders and Torture*, N.Y. TIMES (Mar. 22, 2016, 11:15 AM), https://www.nytimes.com/politics/first-draft/2016/03/22/hillary-clinton-vows-to-defeat-terrorism-but-cautions-about-shutting-borders-and-torture/?_r=0 (quoting Clinton,

of retired admirals and generals wrote letters to the Democratic National Committee and the Republican National Committee, urging them to reject torture in their party platforms.[34] The Democratic platform contained a short section that appears to reject torture in all circumstances.[35] The Republican platform made several statements in support of human rights, but it neither endorsed nor rejected torture (the word does not appear in the document).[36]

During the ensuing presidential campaign between Donald Trump and Hillary Clinton, Trump openly and repeatedly endorsed the use of torture, while Clinton again disavowed it.[37] Whether Trump's narrow victory over Clinton reasonably can be seen as an endorsement of his pro-torture statements is impossible to say. Torture was only one point of disagreement between the candidates, and it does not appear to have been a top motivator for Trump

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"Our country's most experienced and bravest military leaders will tell you that torture is not effective."); Crowley, *supra* note 31 ("[Clinton has] strongly supported Obama's torture ban. So has her Democratic primary rival, Bernie Sanders, who also voted for the McCain-Feinstein [anti-torture] amendment last summer."); Sheryl Gay Stolberg, *On Torture, O'Malley Stands to the Left of Clinton*, N.Y. TIMES (Dec. 10, 2014, 7:10 PM), https://www.nytimes.com/politics/first-draft/2014/12/10/on-torture-omalley-stands-to-the-left-of-clinton/ (quoting O'Malley, "Our long-term security interests are not advanced by engaging in torture and the sort of behavior that runs totally contrary to everything we're about as a people.").

34. Rebecca Kheel, *Generals Urge GOP, Dems to Reject Torture in Party Platforms*, THE HILL (June 30, 2016, 11:08 AM), http://thehill.com/policy/defense/286109-generals-urge-gop-dems-to-reject-torture-in-party-platforms.

35. *2016 Democratic Party Platform*, THE AMERICAN PRESIDENCY PROJECT 47 (July 21, 2016), www.presidency.ucsb.edu/papers_pdf/117717.pdf. The platform statement on torture reads:

> We will always seek to uphold our values at home and abroad, not just when it is easy, but when it is hard. That is why President Obama banned torture without exception in his first week in office and why Democrats condemn Donald Trump's statements that he would engage in torture and other war crimes. We agree with military and national security experts who acknowledge that torture is not an effective interrogation technique.

36. *See generally Republican Platform 2016* (July 18, 2016), https://www.gop.com/the-2016-republican-party-platform/.

37. Jenna Goff & Joan Greve, *Trump vs. Clinton: Fighting Terrorism*, PBS WASH. WEEK (Aug. 23, 2016), http://www.pbs.org/weta/washingtonweek/blog-post/trump-vs-clinton-fighting-terrorism.

voters.[38] Still, polls taken since the 9/11 attacks indicate that "support for torture has slowly increased in the United States," from 56% opposition to torture "even in a 'ticking bomb' scenario" in 2001, to 58% "consider[ing] it justifiable" in 2015.[39] Even more, support for torture skews sharply along political lines: "By 2015, Republican support [for torture] had grown to roughly eight out of 10, while support by Democrats rose only slightly, to four out of 10."[40]

As President, Trump reasserted his belief that torture is an effective interrogation method.[41] Soon after the inauguration, a rumored draft executive order on interrogation and detention that arguably would have enabled a resumption of coercive treatment began circulating, with many outlets reporting that the draft was authored by the Trump White House.[42] Whether or not the White

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38. *See* Jeffrey Anderson, *Trump Won on the Issues*, REALCLEARPOLITICS (Nov. 18, 2016), http://www.realclearpolitics.com/articles/2016/11/18/trump_won_on_the_issues_132383.html. (citing immigration, trade, the Supreme Court, and Obamacare as the decisive issues); Samantha Smith, *6 Charts that Show Where Clinton and Trump Supporters Differ*, FACT TANK, PEW RESEARCH CENTER (Oct. 20, 2016), http://www.pewresearch.org/fact-tank/2016/10/20/6-charts-that-show-where-clinton-and-trump-supporters-differ/ (the six most popular points of contention between the two candidates' voters did not include torture); *Top Voting Issues in 2016 Election*, PEW RESEARCH CENTER (July 7, 2016), http://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/ (torture absent on the list of "top voting issues").

39. Darius Rejali, *Donald Trump's Pro-Torture Rhetoric Could Help Bring Abuse to a Neighborhood Near You*, L.A. TIMES (Feb. 19, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-rejali-trump-torture-20170219-story. html; *see also* Somini Sengupta, *Torture Can Be Useful, Nearly Half of Americans in Poll Say*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/world/americas/torture-can-be-useful-nearly-half-of-americans-in-poll-say.html (reporting on a poll conducted by the International Red Cross that surveyed "17,000 people in 16 countries").

40. Rejali, *supra* note 39.

41. Interview by David Muir with President Donald Trump, *Transcript: ABC News anchor David Muir interviews President Trump*, ABC NEWS (Jan. 25, 2017, 10:25 PM), http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602 ("I have spoken as recently as 24 hours ago with people at the highest level of intelligence. And I asked them the question, 'Does it work? Does torture work?' And the answer was, 'Yes, absolutely.' . . . I wanna do everything within the bounds of what you're allowed to do legally. But do I feel it works? Absolutely I feel it works.").

42. Rumored Draft Exec. Order: *Detention and Interrogation of Enemy Combatants*, https://assets.documentcloud.org/documents/3415371/Read-the-draft-of-the-executive-order-on-CIA.pdf (last visited Mar. 4, 2017). This document is not sourced from an official government website, and White House Press Secretary Sean Spicer stated that the order was "not a White House document." *Sean Spicer: Draft Order on Interrogation Methods "Is Not a White House Document"*, CBS NEWS (Jan.

House prepared the document, "three administration officials said that the White House had circulated it among National Security Council staff members for review."[43] The administration also appointed Gina Haspel to be Deputy Director of the CIA despite her role overseeing a CIA prison at which detainees were waterboarded and subjected to other forms of torture.[44] The Trump administration also recently returned the executive branch's copies of the Senate Select Committee on Intelligence's report on the CIA's torture program.[45]

But neither the administration nor the Republican Party moved in lockstep. Despite his endorsement of torture, Trump also suggested he would defer to the judgment of his military advisors.[46] The proposed executive order incited strong opposition from Senator McCain, who stated, "The President can sign whatever executive

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25, 2017, 12:09 PM), http://www.cbsnews.com/news/trump-executive-action-torture-black-site-prisons/.

43. Mark Mazzetti and Charlie Savage, *Leaked Draft of Executive Order Could Revive C.I.A. Prisons*, N.Y. Times (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/executive-order-leaked-draft-national-security-trump-administration.html. *See also* Jack Goldsmith, *Trump's Self-Defeating Executive Order on Interrogation*, Lawfare (Jan. 25, 2017, 12:13 PM), https://www.lawfareblog.com/trumps-self-defeating-executive-order-interrogation (analyzing the document if it were a final draft); Greg Miller, *White House Draft Order Call for Review on Use of CIA 'Black Site' Prisons Overseas*, Wash. Post (Jan. 25, 2017), https://www.washingtonpost.com/world/national-security/white-house-draft-order-calls-for-review-on-use-of-cia-black-sites-overseas/2017/01/25/e4318970-e310-11e6-a547-5fb9411d332c_story.html?utm_term=.672be9ca0360 (stating that the order was "apparently drafted by the Trump administration"); Deborah Pearlstein, *The Draft Executive Order on Detention and Interrogation*, Opinio Juris (Jan. 25, 2017), http://opiniojuris.org/2017/01/25/the-draft-executive-order-on-detention-and-interrogation/ (discussing worrisome aspects of the document if it was indeed "official.").

44. Matthew Rosenberg, *New C.I.A. Deputy Director, Gina Haspel, Had Leading Role in Torture*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/us/politics/cia-deputy-director-gina-haspel-torture-thailand.html.

45. *See supra* note 25.

46. Michael D. Shear, Julie Hirschfeld Davis, & Maggie Haberman, *Trump, in Interview, Moderates Views but Defies Conventions*, N.Y. TIMES (Nov. 22, 2016), https://www.nytimes.com/2016/11/22/us/politics/donald-trump-visit.html ("On the issue of torture, Mr. Trump suggested he had changed his mind about the value of waterboarding after talking with James N. Mattis [the eventual nominee for Secretary of Defense], a retired Marine Corps general, who headed the United States Central Command."); Interview by David Muir with President Donald Trump, *supra* note 41 ("I will say this, I will rely on Pompeo and Mattis and my group. And if they don't wanna do, that's fine. If they do wanna do, then I will work for that end.").

orders he likes. But the law is the law . . . . We are not bringing back torture in the United States of America."[47] As of June 2017, the White House has not issued an executive order relating to interrogation. Nor, as of June 2017, has there been any evidence of abusive conduct by U.S. officials pursuant to any Trump administration policy. Indeed, recreating a policy of coercive interrogation would take much more than an executive order,[48] although other forms of coercive treatment relating to detention could more easily resume. So far, therefore, the Trump administration's use of torture consists of words and symbolic gestures.

In sum, after ten years of ebbs and flows, by roughly 2012 the terms of political discourse had changed enough that coercive interrogation was a legitimate topic of mainstream national political debate, even though the word "torture" was still off-limits for most observers and participants in American political life. But despite the shift in political discourse, the genie of torture arguably had been stuffed back into the bottle—it was no longer an approved U.S. practice. After the 2016 elections, torture is not just a legitimate topic of debate; it is an issue that candidates of both parties *must* address. The current President of the United States unapologetically uses the word in a discussion of policy options.[49] Even so, in the contemporary landscape, all of this still remains talk. There is no need to debate—yet—whether the practice of torture can be kept to a reasonable level.

As a consequence, and as Žižek predicted, the "ideological presuppositions" about torture have changed.[50] No longer does torture refer to something that happens outside the United States, carried out by the less civilized (but sometimes useful) officials of other countries, and which receives reflexive condemnation when details emerge about it. Now, torture is a topic that falls within the reasonable boundaries of political debate in the United States. Whether or not it can command the support of a clear majority of elected officials or voters, coercive interrogation nonetheless exists for the Republican Party, and for some Democrats and independents, as a legitimate option for

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47. Jordain Carney, *McCain to Trump: 'We're Not Bringing Back Torture'*, THE HILL (Jan. 25, 2017, 10:06 AM), http://thehill.com/blogs/floor-action/senate/316031-mccain-to-trump-were-not-bringing-back-torture.

48. Matt Apuzzo & James Risen, *Donald Trump Faces Obstacles to Resume Waterboarding*, N.Y. TIMES (Nov. 28, 2016), https://www.nytimes.com/2016/11/28/us/politics/trump-waterboarding-torture.html; David Luban, *Trump and Torture*, JUST SECURITY (Mar. 21, 2016), https://www.justsecurity.org/30104/trump-torture/.

49. Interview by David Muir with President Donald Trump, *supra* note 41.

50. ŽIŽEK, *supra* note 7 at 104.

combatting terrorists and related enemies. Although Americans hold sharply diverging views about torture, that divergence confirms its emergence as a partisan political issue, not much different from health care or climate change.[51]

II. THE LAW AND PRACTICE OF TORTURE IN THE UNITED STATES

The post-9/11 discussions of torture have not taken place in a vacuum. To the contrary, they are embedded in a web of legal obligations and prohibitions as well as a history of conduct by law enforcement, prison officials, military personnel, and other government officials in the nineteenth, twentieth, and twenty-first centuries.

A. Torture in International Law

Customary international law bans torture; it is a jus cogens norm from which no derogation is possible.[52] Yet this general prohibition does not provide a very firm foundation for confronting torture. First, the prohibition is not particularly precise or well-defined, because it is the product of a general consensus, not legislative action.[53] Second, customary international law typically requires a strong foundation in actual practice.[54] Although most countries pay lip service to the ban on torture, one could argue that too many countries engage in torture for it to be a peremptory norm—at least so long as practice is a necessary requirement.[55]

But customary international law is merely a starting point. Several international conventions also discuss torture. The Geneva Conventions codify a great deal of international humanitarian law about the treatment of people during armed conflicts. Common Article 3, which appears in all four Geneva Conventions and applies to armed conflicts "not of an international character," declares that "[p]ersons taking no active part in hostilities, including members of the armed forces who have laid down their arms . . . shall *in all circumstances* be treated humanely" – a requirement that includes protection against

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51. *See* Rejali, *supra* note 39 (asserting that from 2001 to 2015, "torture shifted from a nonpartisan issue to a highly partisan one, not unlike the death penalty").

52. Parry, UNDERSTANDING TORTURE, *supra* note 12, at 15–16.

53. *Id.* at 18–19.

54. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. c (1987).

55. *See* Parry, UNDERSTANDING TORTURE, *supra* note 12, at 16–17 (exploring this concern).

"violence to life and person [including] mutilation, cruel treatment, and torture," as well as "humiliating and degrading treatment."[56]

The Conventions impose additional requirements for "all cases of declared war or of any other armed conflict" between parties to the Conventions, and "all cases of partial or total occupation of the territory" of a party to the Conventions.[57] The Prisoners Convention outlaws "acts of violence and intimidation," and it specifically prohibits "torture," "any other form of coercion," or threats.[58] The Civilians Convention contains similar prohibitions.[59] The Conventions also require parties to criminalize "grave breaches," including "torture or inhuman treatment," and "willfully causing great suffering or serious injury to body or health."[60]

Although it is possible to find ambiguities in the Geneva Conventions that arguably produce gaps in coverage, there is no reasonable basis to conclude that the Conventions do not apply to people detained during military actions, including suspected terrorists.[61] There are more significant problems with the Conventions. First, they fail to define their terms, which creates room for national legislatures and political officials to substitute their own views and, second, they do not apply to "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature," which would appear to include some terrorist activities.[62]

Whatever problems may exist with the international humanitarian law of torture, international human rights law largely addresses those issues. The International Covenant on Civil and

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56. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (emphasis added) [hereinafter Prisoners Convention].

57. *Id.* art. 2.

58. *Id.* arts. 13, 17.

59. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (outlawing any "acts of violence or threats"); *id.* art. 31 ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.").

60. *Id.* art. 147; Prisoners Convention, *supra* note 56, art. 130.

61. Parry, UNDERSTANDING TORTURE, *supra* note 12, at 21–23.

62. *Id.* at 24. On the first issue, the Rome Statute of the International Criminal Court and the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia have provided additional detail that roughly aligns international humanitarian law with international human rights law, as declared in the Convention Against Torture. On the second issue, it is not at all clear that the Conventions should apply to anti-terror activities. *Id.* at 24–26.

Political Rights (ICCPR) declares, "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."[63] The ICCPR also provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[64] Notably, although parties to the ICCPR may derogate from some of its provisions "[i]n time of public emergency which threatens the life of the nation," the Covenant prohibits derogations from the ban on torture and cruel or inhuman degrading treatment or punishment.[65] Despite this powerful language and prevention of derogation, however, the ICCPR suffers, like the Geneva Conventions, from a lack of definitions for key terms, including torture. The ICCPR also relies on state parties to use domestic law to "give effect to the rights" that it recognizes.[66]

The most significant source of international law on torture is the Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Not only does CAT ban torture absolutely with no possibility of derogation,[67] it also defines the term:

> the term "torture" means 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 having committed, 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 acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[68]

CAT also bars use in legal proceedings of information obtained by

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63. International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

64. *Id.* art. 10.

65. *Id.* art. 4.

66. *Id.* art. 2(2). The Human Rights Committee has taken numerous actions to address these issues. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 31–34.

67. G.A. Res. 39/46, art. 2. United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

68. *Id.* art. 1.

torture, bars sending a person "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture," and requires each party to enact legislation to "ensure that all acts of torture are offences under its criminal law."[69]

CAT distinguishes between torture—which is the primary focus of the document—and a less serious category of cruel, inhuman, or degrading treatment. A separate article provides simply that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."[70] This undertaking does not restrict the ability to send a person to another country or the ability to use information in legal proceedings. In addition, the ban on derogation in CAT only applies to torture; it does not apply to cruel, inhuman, or degrading treatment.[71]

A reasonable argument thus arises that CAT bans torture absolutely but permits a state to use cruel, inhuman, or degrading treatment when necessary. The text of CAT provides at least a partial response to this argument, because it specifically declares that "[t]he provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion"[72]—and the ICCPR is one of these "other international instrument[s]."

I've discussed CAT's distinction between torture and cruel, inhuman, or degrading treatment elsewhere,[73] and I do not want to suggest too much for this difference in treatment. But, there is at least some basis to believe that this difference was intentional.[74] There is also no doubt that, whatever the "correct" interpretation of CAT, this difference allows countries to play a "definition game" when accused of using torture:

> Within this framework, a state accused of mistreating prisoners can flatly deny that it acted illegally, but it can also argue that whatever it may have done, it has not tortured. If the state can put forward a sufficient justification for the conduct that it claims

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69. *Id.* arts. 3(1), 4(1), 15.

70. *Id.* art. 16(1).

71. *Id.* art. 2.

72. *Id.* art. 16(2).

73. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 36–39.

74. *See id.* at 38 (discussing the progression from the ICCPR, to the Declaration Against Torture, to CAT).

> is not torture, it has not violated the convention. The focus of the debate easily becomes a definition game: Is the conduct torture as defined by law? If not, is there a sufficient legal justification? This game is exactly the strategy that the Bush administration employed.[75]

The ongoing debate in the United States over waterboarding provides a textbook example of this process. During the Republican primaries in 2012 and 2016, many candidates declared that they opposed torture but also insisted that waterboarding is not torture, with the result—they contended—that it can be used when necessary against suspected terrorists.[76]

In sum, international law clearly bans torture in all circumstances, and it attempts to prevent other kinds of coercive treatment as well. As noted, problems—some of them substantial—exist with these legal regulations. One could certainly conclude that these legal rules are not clear or comprehensive enough to prevent bad-faith manipulations, but one could say the same about many areas of law. More significant is the fact that the definition game between "torture" and "cruel," "inhuman," or "degrading" treatment is real, and it exerts an almost irresistible pull on political leaders tempted by coercive interrogation.

B. The International Law of Torture in U.S. Law

The U.S. Constitution's Supremacy Clause declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[77] Since the Founding Era, debate has existed over the circumstances in which a

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75. *Id.* at 6; *see also id.* at 39 ("If the convention is the controlling document, a state will simply claim that its violent conduct is not torture. If that claim is correct under the convention, that state has at worst engaged in cruel, inhuman, or degrading treatment. If the state can come up with a sufficient justification for its conduct, it has not violated the convention at all. At this point, the discussion gets bogged down in definitions, which distract attention from the conduct, its consequences, and its victims.").

76. *See supra* notes 28, 29, 31, and 37.

77. U.S. CONST. art. VI, cl. 2. I do not discuss the status of customary international law in U.S. law (a topic which has become controversial), because treaty-based law against torture is more specific and clear. *See supra* notes 52-55 (discussing CIL on torture).

treaty either automatically becomes law for the federal government (is "self-executing") or requires implementing legislation (is not self-executing).[78] Since World War II, debate has also sprung up about whether states are bound by non-self-executing treaties.[79]

The upshot of these debates at the federal level is, first, that courts will not always enforce the provisions of treaties to which the United States is a party.[80] Second, in recognition of the distinction between self-executing and non-self-executing treaties, the Senate has frequently conditioned its advice and consent to treaties in various ways, including declaring that some treaties are not self-executing and do not create any rights of action.[81] These issues have come up most dramatically with human rights treaties, including the ICCPR and CAT.

The Senate's consent to the ICCPR and CAT contained several reservations, understandings, and declarations about their provisions. One of the most significant is the express declaration that neither document is self-executing.[82]

With respect to CAT, the Senate also stated its understanding that torture only happens when the perpetrator "specifically intended" to inflict severe pain, and it narrowed the kinds of mental harm that count as torture.[83] Both changes are best explained as

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78. *See generally* John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT'L L.J. 1209 (2009) (focusing on the Founding Era and early nineteenth century).

79. *See generally* DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE (2016) (providing a comprehensive discussion of the issues and history of the self-execution and supremacy debates); Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, *supra* note 78 (focusing on the Founding Era and early nineteenth century).

80. *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 528 n. 14 (2008).

81. For discussion of the development of this practice, see SLOSS, *supra* note 79, at 248–56, and Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1302–04 (2008). For a defense of this practice, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 402 (2000).

82. *See* 138 CONG. REC. S4784 (Apr. 2, 1992) (declaration that "the provisions of Articles 1 through 27 of the [ICCPR] are not self-executing."); 136 CONG. REC. S17492 (Oct. 27, 1990) (declaration that "the provisions of Articles 1 through 16 of [CAT] are not self-executing").

83. The Senate specified that:

> [T]he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged

efforts to create more space for coercive action, by protecting government officials and the United States from uncertainty about international law during interrogations or detentions.[84]

For both documents, the Senate also agreed to a reservation that defined the term "cruel, inhuman, or degrading treatment or punishment" as "the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[85] The goal of this reservation is to ensure that the international obligations of the United States go no further than its own constitutional law—in other words, that international law imposes no obligations on the United States in this area. The Bush administration also used this reservation to argue that the obligation to avoid cruel, inhuman, or degrading treatment is limited to the geographic scope of the constitutional rights that define it and that it therefore applies only to conduct in the United States.[86]

In addition to the Senate's advice and consent to the ICCPR and CAT, Congress has enacted legislation, discussed below, to implement CAT.

> mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

136 CONG. REC. S17491 (Oct. 27, 1990).

84. *See* John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1043–44 (2009).

85. 138 CONG. REC. S4783 (Apr. 2, 1992) (ICCPR); 136 CONG. REC. S17491 (Oct. 27, 1990) (CAT).

86. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 181 (discussing this claim); Parry, *Torture Nation*, *supra* note 84, at 1045 (same); *see also infra* note 92 and accompanying text (noting the Detainee Treatment Act's rejection of this position). For a critical analysis of the broader issue of extraterritoriality and human rights conventions, see generally Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20 (2014).

C. Torture in the U.S. Constitution, Statutes, and Court Decisions

The U.S. Constitution contains several provisions that bear on torture. The Fourth Amendment protects against "unreasonable . . . seizures," which the Supreme Court has interpreted as a right against the use of excessive force by law enforcement.[87] The Fifth Amendment protects against compelled self-incrimination and provides that neither life nor liberty can be taken without "due process of law."[88] The Eighth Amendment protects against "cruel and unusual punishments."[89]

These provisions clearly provide important and enforceable protections against official conduct that includes torture and other forms of coercion. But federal courts have interpreted these provisions in a way that balances the interests of the government and government officials against the interests of individuals subjected to government violence.[90] Put somewhat differently, the remedies that are available for violations of these constitutional amendments are uncertain and reflect concern about over-deterrence of official conduct. The result is, on the one hand, some incentive on the part of officials to act reasonably and avoid harm but, on the other hand, a significant amount of unremedied constitutional harm—with the consequence that these rights often carry less weight than their words would suggest.

Beyond the Constitution, numerous federal (and state) homicide and assault statutes address conduct that overlaps with torture.[91] Federal statutes also specifically criminalize torture committed outside the United States by U.S. nationals or by persons later found in the United States.[92] Of course, for any of these statutes to have

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87. U.S. CONST. amend. IV.

88. U.S. CONST. amend. V.

89. U.S. CONST. amend. VIII.

90. For more extensive discussion of the contentions made in this paragraph, see PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 62–70, 154–58; Parry, *Torture Nation*, *supra* note 84, at 1016–28. *See also infra* notes 105-107 and accompanying text.

91. *E.g.*, 18 U.S.C. § 113 (2017) (criminalizing certain assaults committed "within the special maritime and territorial jurisdiction of the United States"), § 1111 (2017) (murder), § 1112 (2017) (manslaughter), § 2242 (2017) (sexual abuse), and § 2244 (2017) (abusive sexual contact).

92. 18 U.S.C. § 2340A (2017). The statute applies to torture committed outside the United States (1) because it was passed to implement CAT and (2) because other statutes already criminalize domestic conduct that amounts to torture. *See also* 18 U.S.C. § 2340B (2017) ("Nothing in this chapter shall be construed as precluding the

significant impact on torture, the federal government must be willing to bring prosecutions—something it has done only rarely.[93] In addition, federal common law recognizes defenses that officials prosecuted for torture might attempt to raise. Perhaps the most obvious is the necessity defense (claiming they used the lesser evil of coercion to prevent the greater evil of a terrorist attack), although the Supreme Court has cast doubt on the availability of the necessity defense in federal criminal prosecutions.[94] But defenses are always potentially available in federal criminal cases, prosecutorial discretion applies to all kinds of prosecutions, and these things do not negate that more basic fact that federal criminal law is available to enforce a ban on torture.

Congress strengthened federal law on torture after the Abu Ghraib scandal and revelations about interrogation abuses at Guantánamo Bay and CIA black sites. The Detainee Treatment Act created several protections for people captured by U.S. forces. First, the Act requires that the treatment of all people held in the custody of the Department of Defense must comply with the Army Field Manual.[95] Second, it provides, "No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or

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application of State or local laws on the same subject"). *But see infra* note 97 (discussing the 2006 amendments to the War Crimes Act).

93. One person has been prosecuted under 18 U.S.C. § 2340A. *See* United States v. Belfast, 611 F.3d 783, 828 (11th Cir. 2010). For actions taken against U.S. officials, *see supra* note 25.

94. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 72–74. If a federal official were prosecuted for conduct that took place before 2006, he or she might also be able to rely on the defense of reasonable reliance on official interpretations of law—basically, the defense that a government lawyer said the conduct was legal. *See id.* at 74; *see also* John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 3 (1997). This due process defense was codified in the torture context by § 1004 of the Detainee Treatment Act. *See supra* note 14. But this defense should have little relevance to post-2006 conduct. After all of the public debate about torture, as well as subsequent legislation specifically restricting federal interrogation practices, how could a reasonable person conclude that coercive treatment is legal? At most, an official reasonably could believe that the legality of some coercive methods is debatable. The contrary assertion of a government lawyer that such conduct is legal should not be sufficient.

95. *See* Detainee Treatment Act, *supra* note 14. For the Field Manual, see Army Field Manual on Human Intelligence Collector Operations (FM 2-22.3) (Sept. 2006), https://www.state.gov/documents/organization/150085.pdf. For critical analysis of FM 2-22.3, *see* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 199–200; Van Schaack, *supra* note 17.

degrading treatment or punishment."[96] Third, the Act eliminates any ambiguity that may have existed about the geographic scope of the obligation to prevent cruel, inhuman, or degrading treatment: "Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section."[97] The 2015 National Defense Authorization Act included a provision which expanded the Detainee Treatment Act's protections by requiring that the interrogation of any person detained by the United States during an armed conflict must comply with the Army Field Manual.[98]

Federal courts have addressed torture and violence related to discrimination and persecution in asylum and withholding of removal cases, and more generally in criminal cases and litigation under the Alien Tort Statute and Torture Victim Protection Act.[99] The results have been somewhat inconclusive. Many decisions have applied federal law to find that a claimant suffered torture, but those decisions often do little to develop the law.[100] Courts hearing immigration-related cases often do not have to make a specific finding of torture in order to rule for the person seeking to stay in the United

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96. Detainee Treatment Act, *supra* note 14, § 1003(a).

97. *Id.* § 1003(b). Even as this statute was expanding protections for prisoners, however, Congress limited the reach of federal criminal law by revising the War Crimes Act to sharply limit the conduct that would qualify for prosecution as grave breaches of the Geneva Conventions. These limitations might also impact the scope of prosecutions under 18 U.S.C. § 2340A. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 200–01.

98. National Defense Authorization Act for Fiscal Year 2016, S. 1356, 114th Cong. § 1045(a) (2015).

99. 28 U.S.C. § 1350 (2017); 28 U.S.C. § 1350 note. Significant Alien Tort Statute cases that discuss torture include *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir.1996), Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1996), Siderman De Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), and Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

100. For example, many commentators cite *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984), in which the Fifth Circuit considered the appeal of a deputy who was tried in federal court alongside other county law enforcement officials for violating the civil rights of prisoners by using "water torture." The only issue on appeal was the deputy's motion for severance. Perhaps for that reason, the court did not describe the facts in great detail, and although it used the word "torture" repeatedly, it made no ruling at all on what torture means. Still, the *Lee* decision is authority—if any is really needed—that something like waterboarding is a criminal civil rights violation.

States.[101] In many other cases, the decision is easy because it was obvious that specific conduct was torture or that all the relevant conduct taken together amounted to torture.[102] Note, however, that in immigration cases that directly raise the issue of torture, courts typically defer to the executive branch's assertion that the term "specifically intended" in the Senate's advice and consent to CAT[103] means a mens rea of specific intent, with the result that deliberate government actions that cause severe pain often will not qualify as torture.[104]

In the specific context of civil rights claims for damages arising from the Bush administration's detention and interrogation practices, most federal courts, including the Supreme Court, have avoided the merits and instead have dismissed the claims on other grounds.[105]

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101. Torture claims in immigration-related cases usually arise in three contexts: (1) in asylum cases when deciding whether an alien faces "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42)(A) (2017); (2) for withholding or removal based on a threat to the alien's "life or freedom because of the alien's "race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1231(b)(3)(A) (2017); or (3) if an alien invokes the protections of the Convention Against Torture pursuant to 8 C.F.R. § 208.18 (2017).

102. *See, e.g.*, United States v. Belfast, 611 F.3d 783, 828 (11th Cir. 2010) (summarizing relevant conduct in criminal prosecution under 18 U.S.C. § 2340A (2017) as "severe and repeated beatings, burnings, shockings, and brandings on his victims" and "forc[ing] his kidnapped victims to live . . . in water- and corpse-filled pits with little or no clothing, and with festering wounds and burns"); *see also* HUMAN RIGHTS WATCH, *supra* note 25, at 64 n. 295 (stating Alien Tort Statute cases tend to consider torture claims that involve several practices and so do not usually analyze specific methods).

103. *See supra* note 83.

104. *See* Cherichel v. Holder, 591 F.3d 1002, 1010 (8th Cir. 2010) (collecting cases).

105. Many of the cases have been brought under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (recognizing implied damages cause of action for violation of the Fourth Amendment but noting that a claim may not be available if there are "special factors counseling hesitation in the absence of affirmative action by Congress"). The Supreme Court recently made clear that *Bivens* claims will have little if any traction in this area. *See* Ziglar v. Abbasi, 582 U.S. ___, 2017 WL 2621317 (June 19, 2017). For discussion of *Ziglar*, see Steve Vladeck, *On Justice Kennedy's Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SECURITY (June 19, 2017), https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/. Even before *Ziglar*, lower federal courts commonly used the special factors analysis to deny a *Bivens* remedy. *See* J. Andrew Kent, *Are Damages Different?* Bivens *and National Security*, 87 S. CAL. L. REV. 1123, 1125 (2014) ("Five of the federal circuit courts have held in these cases that it is inappropriate to authorize a *Bivens* damages remedy against federal officials in suits involving sensitive national security or foreign

Exceptions to this trend are rare and likely to be short-lived.[106] Even on the merits, torture victims have trouble prevailing under well-established civil rights law. Consider the comments of the Ninth Circuit in *Padilla v. Yoo*, explaining its conclusion that the defendant in a *Bivens* case—one of the Office of Legal Counsel attorneys whose memoranda provided legal authority for the post-9/11 coercive interrogation program—was entitled to qualified immunity.

> In 2001–03, there was general agreement that torture meant the intentional infliction of severe pain or suffering, whether physical or mental. The meaning of "severe pain or suffering," however, was less clear in 2001–03. . . .
>
> We assume without deciding that Padilla's alleged treatment rose to the level of torture. That it *was* torture was not, however, "beyond debate" in 2001–03. There was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate, as well as the judicial decisions discussed above, we cannot say that any reasonable official in 2001–03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture. Thus, although we hold that the unconstitutionality of torturing an American citizen was beyond debate in 2001–03, it was not clearly established at that time that the treatment Padilla

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relations issues, even when the plaintiff had no other effective remedy for the allegedly unconstitutional conduct of the U.S. government."); *see also* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 510–11 (2013) (arguing federal courts of appeals incorrectly "applied a presumption against recognition of a *Bivens* cause of action in dismissing damages suits alleging constitutional violations arising out of federal officials' pursuit of various national security and counterterrorism policies" and observing that "concerns about judicial interference with national security justified [these courts'] refusal to recognize a damages remedy . . . ."). For extensive discussion of this issue, see JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR (2107).

106. *See* Al Shimari v. CACI Premier Technology, Inc., 840 F.3d 147, 162 (4th Cir. 2016) (reversing the district court's political question-based dismissal of an Alien Tort Statute suit against a private contractor over abuse at Abu Ghraib, stating torture is an issue that courts can decide, but not providing any standards); Turkmen v. Hasty, 789 F.3d 218, 233 (2d Cir. 2015) (allowing *Bivens* claim for unconstitutional conditions of confinement claims relating to terrorism-related detention), *rev'd sub nom.* Ziglar v. Hasty, 582 U.S. ___, 2017 WL 2621317 (June 19, 2017) (rejecting all but one of plaintiffs' *Bivens* claims and remanding the remaining claim for reconsideration).

alleges he was subjected to amounted to torture.[107]

In short, the law of the United States does a great deal to ban torture and other cruel practices, but it also has some significant shortcomings. Although U.S. courts have addressed torture claims in numerous cases, they have not developed a strong anti-torture jurisprudence to animate the formal legal prohibitions. Still, despite its imperfections and inconsistent utility, the general U.S. prohibition on torture is stable and unlikely to crumble without a concerted political effort to weaken it.[108]

D. Traditions of Torture in the United States

Any suggestion that there might be a future for American torture also raises the question whether American torture has a past. To a certain extent, the answer to that question is easy. U.S. torture has a recent past under the Bush administration.[109] For many political figures and commentators, of course, the policies and conduct of the Bush administration are an aberration—a departure from a history of commitment to the anti-torture norm. Others, however, focus on the specific anti-terrorism context in which the Bush administration employed torture and other forms of coercion and argue for historical continuity in the sense that the country should remain prepared to use coercion when "necessary."[110]

My focus is less on the recent past, standing alone, and more on the claim that the Bush administration's policy was an aberration in the context of U.S. history more generally. I have detailed elsewhere the extent to which the United States—sometimes directly and sometimes as an aider or abettor—has been involved with torture as

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107. Padilla v. Yoo, 678 F.3d 748, 767–68 (9th Cir. 2012) (internal citations omitted); *see also* al-Kidd v. Ashcroft, 580 F.3d 949, 981 (9th Cir. 2009) (denying qualified immunity for Fourth Amendment *Bivens* challenge to allegedly illegal terrorism-related detention), *rev'd* 563 U.S. 731 (2011) (holding there was no Fourth Amendment violation and defendants were entitled to qualified immunity).

108. *See* Luban, *supra* note 48 ("The politics behind repealing or amending the laws would, I think, be nearly impossible."). For a more dedtailed analysis of whether the United States could return to a policy of torture, see Adam D. Jacobson, *Could the United States Reinstitute an Official Torture Policy?*, 10 J. STRATEGIC SEC. 97 (2017).

109. *See generally supra* notes 10 and 12 (collecting sources on the Bush administration's policy and practice of coercive interrogation).

110. *See, e.g.*, *supra* notes 23, 27–29, 31, 37 (discussing the Republican Party platforms and positions of Republican candidates for President in 2008, 2012, and 2016).

an imperial power: in the Philippines after the Spanish-American War, in the aftermath of World War II, and during the Cold War, including in Vietnam and Latin America.[111] Nor should the violence associated with slavery and continental expansion be left out of the historical narrative.[112] I have also suggested the ways in which police violence, the treatment of prisoners (including in "supermax" prisons that served as the model for the Guantánamo Bay detention facility), and immigration detention suggest, at best, a national policy of unconcern about coercion.[113] I have even argued that coercion is consistent with—and arguably constitutive of—liberal democratic government.[114]

The claim of aberration adopts a very different focus: a line of progress or, more boldly, of continuity drawn from George Washington refusing to mistreat British prisoners during the Revolutionary War,[115] to the general orders issued by the Union in the Civil War (the Lieber Code),[116] to post-World War II U.S. participation in drafting the Universal Declaration of Human Rights and the Geneva Conventions, to the ratification of the ICCPR and CAT, to the Carter and Obama administrations' emphasis (at least some of the time) on human rights.

The aberration claim, to the extent it ignores or minimizes the actual conduct of the United States that I have noted above, is an

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111. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 136–51; Parry, *Torture Nation*, *supra* note 84, at 1005–16.

112. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 136; Parry, *Torture Nation*, *supra* note 84, at 1004–05.

113. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 61–71, 151–63; Parry, *Torture Nation*, *supra* note 84, at 1016–31.

114. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 78–96, 133–34.

115. *E.g.*, James Norton, *Roots of US War Prisoners' Rights Run Deep*, CHRISTIAN SCIENCE MONITOR (June 14, 2006), http://www.csmonitor.com/ 2006/0614/p09s02-coop.html. *But cf. Perfidious America*, THE ECONOMIST (Dec. 17, 2014), http://www.economist.com/news/christmas-specials/21636606-many-his-successors-americas-first-president-wrestled-ethics-war (discussing George Washington and the "ethics of war"); Joseph F. Stoltz, III, *Jumonville Glen Skirmish*, *in* THE DIGITAL ENCYCLOPEDIA OF GEORGE WASHINGTON, http://www.mountvernon.org/digital-encyclopedia/article/jumonville-glen-skirmish/ (last visited Apr. 10, 2017) (detailing a "battle" in which the French argued Washington's men committed murder, as "Great Britain and France were not [yet] at war."). For the claim that both sides committed brutal acts during the Revolutionary War, see HOLGER HOOCK, SCARS OF INDEPENDENCE: AMERICA'S VIOLENT BIRTH (2017).

116. Although the Lieber Code is a more complicated example than its proponents typically will admit. *See* PARRY, UNDERSTANDING TORTURE, *supra* note 12, at 139–40.

invented tradition.[117] But the fallacy of the aberration claim is not an argument for adopting a similarly narrow focus on the revisionist history that I have highlighted—unless one's goal is to construct a competing invention. Neither approach is accurate. Like many countries, the United States has seen moments in which, sometimes openly and sometimes not, its leaders have used torture and related forms of coercion to achieve their goals, as well as moments when its leaders deliberately have chosen a different path. Commentators and citizens have sometimes gone along with government policy and action—whether pro or anti-torture—and sometimes they have advocated in the opposite direction.

Invented traditions are about ideology, about the need for a "masterplot" that provides a positive "individual or social or institutional life story."[118] They provide one path to a cohesive sense of identity, but they do so simplistically. I want to suggest that, instead of searching for identity through inventions, commentators must grapple straightforwardly with the complexities of U.S. engagement with torture. The goal should not be to craft a story that supports U.S. leadership in human rights based in American exceptionalism, nor should it be to expose the United States as a hypocritical and nefarious nation. It would be far better to adopt a chastened recognition that the United States is, in most ways, an ordinary—albeit extremely powerful—country, without an overarching and world-historical identity. Among other things, I would argue that only this chastened, complex identity can provide a foundation for an honest discussion of torture.

III. TORTURE TALK AND TORTURE IDENTITY

The United States has shifted from an unexamined anti-torture position to a situation in which mainstream public policy figures happily advocate the use of mental and physical coercion. The new torture talk revels in a self-consciously tough tunnel vision: Bad people are threatening the United States and the lives of its citizens. They must be stopped, and we need leaders who are not afraid to do

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117. *See* Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1 (Eric Hobsbawm & Terence Ranger eds., 1983); John T. Parry, *What Is the Grotian Tradition in International Law?*, 35 U. PA. J. INT'L L. 299, 366–67 (2013). *See also* WISNEWSKI, *supra* note 9, at 24–27 (suggesting the decline of torture in Europe in the eighteenth centuries was not the product of enlightenment ideals but instead resulted from "change[s] in the epistemology of jurisprudence").

118. Parry, *Grotian Tradition*, *supra* note 117, at 367 (quoting PETER BROOKS, READING FOR THE PLOT: DESIGN AND INVENTION IN NARRATIVE 5–6 (1984)).

what is necessary, in contrast to leaders who shy away from the tough choices. People who oppose torture may not hate America, but they live in a fantasy world of rights and ignore the unfortunate but ugly realities of governing in a chaotic and dangerous world.

That is not what I mean by a chastened and complex national identity, nor is this tough talk an honest discussion of torture. It leaves no room for exploring the reasons for the legal rules or the past history and consequences of U.S. torture. Instead, the post-9/11 world appears as an unprecedented, exceptional space, unmoored from history.

Still, in this new world of unashamed torture talk, words and deeds remain distinct. The Trump administration has made no immediate effort to implement a policy of coercion. Is all of this much ado about nothing? Can one safely or hopefully dismiss the talk as rhetoric that will fade away as other issues come to the fore?

I think the answer to these questions is no. To the extent that language reflects intentions, beliefs, and self-conceptions, there is a point at which torture talk becomes torture practice. That is to say, a country whose leaders debate and advocate torture without concern for its impacts cannot also be a country that is against torture. Its ability to play a leading role in efforts to minimize, account for, remedy, or eliminate torture is compromised. Its image—its identity internally and externally—is that of a nation willing to use the most destructive forms of state violence against individuals,[119] if it determines such violence will serve its purposes, including the purpose of security. The actual use of torture is confirmation of the talk, but my claim is that the talk itself is sufficient.

Put plainly, contemporary torture talk is not a responsible option, even for advocates of coercion. To the extent one seeks to craft a coercive interrogation policy and embrace the torture nation identity, one should at least know its costs. Wise policy comes from asking questions and being attentive to the answers. So, the United States at times has been a nation that tortures; how has that worked out in specific instances? Are there lessons to be learned? At other times, the United States has been a nation that outlaws and speaks against torture; has that position produced benefits? Are there benefits from a policy of coercion that would outweigh the benefits of opposing torture? What is the relevant time frame for assessing those costs and benefits? The United States has a variety of foreign policy interests, commitments, and goals; how would a coercive interrogation policy affect them? These questions, and no doubt others as well, should be

119. For the effects of torture, *see, e.g.*, *supra* note 12.

part of any meaningful debate over torture, especially if one intends one's talk to be taken seriously. But the torture talk that claims a place at today's public policy table has not advanced much beyond the ticking bomb arguments that dominated the discussion in 2002.

What about contemporary *anti*-torture talk? Can it really be sufficient to assert that torture is illegal, that it violates international law, or that "we" betray "our" values whenever the United States engages in torture? I think not. First, opponents of torture must continue to give reasoned answers to the basic policy questions raised above (that is to say, in many cases they must repeat the answers and arguments that they have given over the past fifteen years). But these arguments will not be sufficient, according to J. Jeremy Wisnewski, who suggests that "even the best set of arguments is unlikely to end torture" if based on an appeal to "universal reason," which too easily makes room for counter-arguments, also based in reason, in favor of torture.[120]

Second, arguments against torture must therefore go deeper than rational discussion of costs and benefits and whether being pro or anti-torture is a better foreign policy position. Opponents of torture tend to believe in universal human rights, grounded in equal human dignity and other values. These arguments are appealing to many people. The problem is that these assertions are not obviously true, and not everyone agrees with them or believes that they are the foundation for rights.[121] Many torture opponents ground their opposition and their arguments about dignity, equality, and rights in religious belief or in analogies to it.[122] Of course, arguments based in religion tend to work only with co-religionists, and others may find them unconvincing or even off-putting. Whether based in dignity as

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120. WISNEWSKI, *supra* note 9 at 130–31.

121. *See id.* at 160 (asserting that arguments about human dignity "won't likely convince anyone who is not already leaning toward the inviolability of dignity"). *Compare* JEREMY WALDRON, DIGNITY AND RANK 14, 21–22 (2012) (arguing that dignity, as "a ground of right," rests on legal status and is not itself a foundation for rights), *with* Meir Dan-Cohen, *Introduction*, in *id.* at 5 (expressing concern about anchoring dignity, and thus rights, "in evolving social practice [rather] than in Kantian metaphysics").

122. *See* CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY, AND PRESIDENTIAL POWER 34–38 (2010) (drawing on the idea that the torture victim is the "image of God" but insisting that this argument can be made in a non-religious way as well); JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 269 (2010) (also using the idea of the image of God); *see also* JEREMY WALDRON, THE IMAGE OF GOD: RIGHTS, REASON, AND ORDER, IN CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION 216 (John Witte & Frank Alexander eds. 2010) (exploring this idea beyond the context of torture).

such, or in religious belief, these arguments suggest the fruitfulness of appeals to a capacious conception of natural law, grounded in alternative or overlapping claims of religion, moral commitments, or reason.

And yet, third, none of this is new. Lawyers and hard-headed political insiders have made legal and policy arguments against torture for years, while human rights activists and religious leaders have deployed their own arguments. They have not lost the argument, but neither can they win with these tools. "If there is to be an end to torture," writes Wisnewski, "it will not be found in the creation of additional laws or the deployment of additional arguments."[123] Instead, he argues, the case against torture must be made over and over again, not just with legal, philosophical, religious, and political argument, but also through "literature, art and film," which "particularize[e] human beings in living contexts."[124] Combating torture requires attention to "concrete particularity, the suffering that torture involves" for specific people.[125] To be more specific, for those of us who have suggested in various ways that coercion might be justifiable in some circumstances, Wisnewski demands attention, not simply to the rationale for these suggestions, but far more to the bodies, anguish, and pain of the specific people who suffer from the treatment so easily described in general as "enhanced," "exceptional," or "necessary." And if one pays attention in this way, one must acknowledge not just dirty hands,[126] but also whose blood is under one's fingernails.

It turns out, in short, that there is no foolproof way to combat torture. Torture talk is easy, coercive treatment will happen, and reasonable arguments exist for justifying at least some coercion in some circumstances. Countering all of this is far more difficult. Nonetheless, the effort is necessary. The genie of torture is always already coming out of the bottle, but it is also always possible to push back against the genie. The national identity of the United States includes a history of torture and coercion, and it now includes the willingness to talk openly about using torture. If talk can lead to action, then at the very least the conversation, like the consequences, must be serious, and the responsibilities must be clear.

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123. WISNEWSKI, *supra* note 9, at 230–35.

124. *Id.* at 161.

125. *Id.* at 233; *see also id.* at 236 (opposition to torture "depends on an appreciation of both the suffering and the subjectivity of the person being tortured").

126. *See* Michael Walzer, *Political Action: The Problem of Dirty Hands*, exerpted in TORTURE: A COLLECTION, *supra* note 9, at 61; Elshtain, *supra* note 9.