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Introduction

Things changed on September 11, 2001. But despite what some people said, not everything changed.

Americans' understanding of the worst that terrorists could do to us certainly changed, as did the long experience of continental invulnerability against outside attack enjoyed by the American people since the last days of the war of 1812. (There had been terrorist attacks in the continental United States before, but they were homegrown terrorists—like Timothy McVeigh—with domestic grievances. And apart from some Japanese balloon-borne incendiaries in 1944–5, there had been no foreign attack on the American mainland since 1814. There was war certainly, from 1861–5, but it had the character of a massive internal rebellion.) But after September 11, things were different. We needed to change security arrangements for public buildings and our practices of search and scrutiny for passengers boarding airplanes; we strengthened the cockpit doors on our airliners; we began keeping better track of visitors to our shores; and we changed some of the arrangements for securing our ports against the importation of dangerous goods, including radiological bombs and weapons of mass destruction. (Many people believe that these arrangements need further strengthening still.)

We realized, too, that we could not stand by and let a country like Afghanistan become a safe haven for terror training camps and Al Qaeda operations, and we are still living with the consequences of that decision in the military operations that continue in that country (at the cost so far, at the time of writing, of more than 900 Americans killed and thousands seriously wounded).[1] There was an all-out effort to identify and apprehend terrorist operatives, particularly those associated with Al Qaeda, to find out as much as we could about the operation, to eavesdrop on anything that might remotely be considered a communication

[1] This was written in mid-November 2009. (The numbers here do not include the toll of the war in Iraq.)

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between Al Qaeda operatives and fellow travelers, to disrupt their financing, and to interdict their operations. We refocused much of our foreign policy and almost all of our domestic security policy on anti-terrorism concerns and we pushed hard to ensure that as many other countries in the world as possible took the events of 9/11 and the sense of foreboding generated by those events as seriously as we did. Much of this represented a departure from our previous practices, lax and unfocused as they were. Those practices had to change after 9/11.

But some things did not change. Terrorist acts of the sort that we saw on September 11, 2001 were prohibited by law and condemned as wrong and murderous by morality on September 10 just as they were on September 12. Considered as acts of war, they were deliberate and egregious violations of the laws and customs of armed conflict. Considered as crimes—which they were—they were acts of mass murder. The morality of terrorism didn't change on September 11. The spectacle did and many more people thought more about terrorism after the 9/11 events or condemned it more vehemently. Some of this thinking meant that people became both more precise, but also at the margins less confident, about the exact meaning of 'terrorism' and its distinction from other military doctrines and other kinds of crime. There has been a fruitful discussion of all that, to which Chapter 3 of this volume is a contribution: what is morally or legally distinctive about terrorism? What distinguishes it from other forms of murder or other forms of armed attack?

With a very few exceptions, this renewed focus on the concept of terrorism has not led to any revision in our evaluation of it, except perhaps at the margins where opinions may differ as to whether it is appropriate to use the term to cover such things as revolutionary armed struggle, partisan insurgency, unexpected attacks on armed forces (in barracks, for example), and the use of weapons of mass destruction against civilian populations by well-established states.[2] But the 9/11 attacks were right in the center, not at the margins, of the idea of terrorism. And so far as the core of the concept is concerned, the basis for condemning terrorism has remained constant: as I explain at the beginning of Chapter 4, terrorists make a military doctrine out of murdering civilians with the hope of exploiting to political and military advantage the terror and trauma likely to be occasioned by such a brazen violation of the laws of armed

[2] For a useful review and assessment of possible justifications for terrorism, see Saul 'Defending "Terrorism": Justifications and Excuses for Terrorism in International Criminal Law.' Saul notes, quite rightly, that the more encompassing the definition of 'terrorism,' the greater the chance that it may include some actions that seem justifiable.

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conflict. That is why terrorism is always wrong, and that didn't change on September 11, 2001.

But other things stayed the same too, things whose constancy disconcerted those who were trying to prevent a repetition of the 9/11 attacks. There are certain things that a community may do to protect itself. But there are certain things that it may not do, even when they are thought to be necessary, and the list of these remained roughly the same. For example, though it was appropriate for the United States and its allies to apprehend, detain, and interrogate large numbers of terrorist suspects around the world, it would not have been appropriate—it would have been legally and constitutionally forbidden—to simply 'round up' American residents of Muslim faith or Arab extraction and concentrate them in camps, in order to sort out at leisure who was a suspect and who wasn't.[3] The laws prohibiting this did not change, and it was not something that anyone tried to do.

Other things remained unlawful, although they happened. The laws relating to torture did not change after 9/11. Torture remained absolutely forbidden by international law (by treaties that the United States has signed and ratified)[4] and domestic legislation (by a statute that Congress enacted in 1994).[5] The legal prohibition on torture was then and is now unequivocal and unconditional: there is no provision in law for the occurrence of traumatic events like those of 9/11 (or the prospect of their repetition) to make a difference to the legal status of deliberately inflicting severe mental or physical pain in the course of interrogation. In some bodies of human rights law, the prohibition on torture is made absolute in a very literal sense: the provision which permits some derogation from human rights in times of 'public emergency which threatens the life of the nation' is said explicitly not to apply under any circumstances to torture or the prohibition on inhuman and degrading treatment.[6] In other bodies of law, such as the U.S. Anti-Torture statute,

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[3] This was the scenario envisaged in a movie made a year or two before 9/11, *The Siege* (20th Century Fox, 1998), directed by Edward Zwick starring Denzel Washington, Annette Bening, and Bruce Willis.

[4] See International Convention on Civil and Political Rights (ICCPR), Article 7; and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[5] USC Title 18, Part I, Chapter 113C—Torture (§§ 2340–2340B).

[6] See, e.g. ICCPR Article 4: '(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law

there is no such explicit doctrine, because there is no arrangement for derogation of any provisions; the absoluteness of the rule against torture is simply inferred directly from its categorical imposition. No provision is made by legislation for any emergency exception and speculative attempts to exploit the criminal law doctrines of justification or necessity—e.g. by officials in the Justice Department's Office of Legal Counsel[7]—have usually met with skepticism from human rights lawyers. In the wake of 9/11, many of us assumed that the prohibitions on these practices would stand.[8]

Not only was there no change in the unlawfulness of torture after 9/11, even in the face of what seemed like an enhanced prospect of more destructive terrorist attacks and a pressing need for information to pre-empt them, but I believe there was no change in its moral status either. Torture was and remains a moral as well as a legal abomination. I did not say nearly enough about its moral wrongness in the article on torture that became Chapter 7 of this volume,[9] so let me try to say something here.

and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from article [ ]…7…may be made under this provision.'

[7] See Bybee, 'Standards of Conduct for Interrogation under 18 U.S.C. 2340–2340A,' in Greenberg and Dratel (eds), *The Torture Papers*, pp. 207–9. The obvious argument against the availability of a necessity defense is the law's insistence on the absolute nature of the prohibition. As Meisels points out ('Torture and the Problem of Dirty Hands', *Canadian Journal of Law and Jurisprudence*, 21 (2008) 149 at 167–8), the 'Convention [a]gainst Torture explicitly states that: "No exceptional circumstances whatsoever, whether a state of war, internal political instability or any other public emergency may be invoked as a justification of torture." And this should almost certainly be taken to apply to any necessity defense as well.'

[8] In July 2002, a Committee of Ministers of the Council of Europe (the organization responsible for the European Convention on Human Rights) adopted a set of guidelines for the fight against terror that included a reaffirmation of the absolute prohibition of torture. See *Guidelines on Human Rights and the Fight Against Terrorism* available at <http://www.coe.int/T/E/human_rights/h-inf(2002)8eng.pdf>. 'The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of…terrorist activities, irrespective of the nature of the acts that the person is suspected of…' For this reference I am grateful to Levinson, '"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11,' at 2013–17.

[9] Though I claimed in that article that torture is morally forbidden in all circumstances, I did not really make the case for a moral absolute. I was concerned in that article to deepen our sense of a *legal absolute*, to take seriously what it means for something to be utterly forbidden by law, not just in the sense of there being a text forbidding it but in the deeper sense of its comprehensive incompatibility with the kind of legal order that we are familiar with.

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Torture, like terrorism, instrumentalizes the pain and terror of human beings; it involves the deliberate, studied, and sustained imposition of pain to the point of agony on a person who is utterly vulnerable, prostrate before his interrogator, and it aims to use that agony to shatter and mutilate the subject's will, twisting it against itself and using it for the purposes of the torturer.[10] Before 9/11, it was widely thought that our experience in mid-century of the worst that could be done in these regards to a human being by a state would warn us away from ever again approaching the boundaries of these practices. It was thought, too, that our knowledge of what the regimes were like that continued to use torture after 1945 would only intensify this warning. Such states establish themselves on *a wholly different basis* than states that are determined to uphold the dignity of their subjects. They rule on a basis of fear and brutality, and that increasingly affects the way they carry out *all* the functions entrusted to them. Quite apart from its intrinsic wickedness, torture metastasizes; it infects all aspects of a state's operation.[11] At best, even when there is some assurance that the application of torture will be confined to outsiders and pariahs, its limitation (and whatever health, safety, and moral well-being can accrue to the regime that uses it) depends on a distinction between *us* and *them*. Such a distinction—between what we may do or countenance doing to each other and what we may do or countenance doing to outsiders—is itself something dangerous and terrifying in its broader implications for governance. All this was true and well-known before September 11, 2001, and it remained true after 9/11, even if many people tried to push out of their minds this knowledge of the true character of torture and its effects, in the interests of making themselves or their loved ones more safe.

Around 2003–4, I became acutely aware that I was in a minority on this matter, if not among ordinary Americans then certainly among my colleagues in moral philosophy and jurisprudence.[12] Once it became

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[10] This account of torture's wrongness draws on Sussman, 'What's Wrong with Torture?' and on an unpublished lecture by Charles Fried delivered at Columbia Law School in March 2009. I am grateful also to Mary-Ellen O'Connell and Henry Shue for discussion of these terrible themes.

[11] The best account of this remains Shue, 'Torture.' See also Shklar, 'Liberalism of Fear' and Margalit, *The Decent Society*.

[12] The article on which Chapter 7 is based was written in the summer of 2004. It was a grim time, and other people who were trying to bring to light the facts about the use of torture had a much grimmer time than I did. The poetry of Wordsworth (*Prelude*, Book 10, pp. 373–83) seemed apt in those dark days: 'Most melancholy at that time, O friend, | Were my day-thoughts, my dreams were miserable; | Through months, through years, long after the last beat | Of those atrocities (I speak bare truth, | As if to

apparent that the government was using or contemplating the use of torture (or attempting to conceal or equivocate about the use of torture), in order to extract information about terrorist organizations and possible future terrorist attacks, there should have been an outpouring of condemnation. One would have expected a brave, honorable, and God-fearing citizenry to have said: 'Even if such interrogations make us safer, we do not want security that is tainted in this way by the abomination of torture.'[13] In fact there was a great deal of enthusiasm for torture,[14] and such condemnation as there was seemed to be half-hearted and heavily qualified. Prominent legal scholars, even people usually committed to civil liberties, spoke openly of the possibility of issuing 'torture warrants' to enable the imposition of severe pain in interrogation to take place under judicial supervision.[15] The churches were largely silent (at least until 2006):[16] nobody talked of excommunicating advocates for torture in the way that the Roman Catholic church talks routinely these days about excommunicating advocates for abortion. As for the philosophers, it seemed to them that our morality did not have the resources to rule out torture in every circumstance, and it became routine in discussions of this matter to always *begin* by emphasizing that *of course* in anything like a 'ticking bomb' situation, torture would be the appropriate, if not the morally requisite, recourse. In these discussions, reference to the horror of torture was unavailing; it would be parried by reference to the greater horrors that might be averted by the use of torture, horrors reformulated, if need be—with all the versatility associated with such casuistry—as horrors *of* torture averted *by* torture; all of which was supposed to yield the conclusion that we simply *couldn't* regard torture

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thee alone in private talk) | I scarcely had one night of quiet sleep, | Such ghastly visions had I of despair, | And tyranny, and implements of death, | And long orations which in dreams I pleaded | Before unjust tribunals, with a voice | Laboring, a brain confounded, and a sense | Of treachery and desertion in the place | The holiest that I knew of—my own soul.'

[13] See Shue, 'Preemption, Prevention, and Predation.' See also the discussion in Chapter 8, below, at p. 270.

[14] See, e.g. Charles Krauthammer, 'The Truth about Torture: It's Time to Be Honest about Doing Terrible Things,' *The Weekly Standard*, December 5, 2005.

[15] See Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age*, pp. 470–7 and *Why Terrorism Works*, pp. 132–63.

[16] No doubt these things take a while to percolate through the ecclesiastical imagination. It was *more than three years* after the first credible allegations emerged, that some church folk got together to form a National Religious Campaign against Torture; and some have been ostracized within their church hierarchies for this stand. I discuss this at greater length in Chapter 8.

as out-of-the-question in *all* circumstances.[17] That conclusion given, the philosophers could proceed to a discussion of real-world cases—at Bagram airbase or Guantánamo Bay—confident in a sense that whatever moral prohibition applied to torture was certainly not absolute.[18]

The Bush Administration always denied that it ordered or countenanced the use of torture against detainees in the 'war on terror.' That denial is probably disingenuous, depending at the very least on a tendentious classification of the near-drowning technique called 'waterboarding' as something other than torture. What is beyond doubt is that brutal and degrading techniques were used repeatedly—ranging from psychological attacks on the subjects' religious practices and sense of sexual modesty, through techniques such as sleep deprivation, solitary confinement in darkness with rodents and insects, stress positions, the use of heat and cold, and auditory assault by constant noise, all the way to direct physical assaults like severe beatings (in some cases detainees were beaten to death), repeated waterboardings, and assaults using animals.[19] Protests against the use of these techniques came much more consistently from military officials (particularly from military lawyers) than from clergymen or moral philosophers.[20] Moral philosophers for their part seemed perfectly willing to complement their approval of torture for extreme hypothetical cases with a more reckless approval of coercive techniques short of 'torture' (on the definitions they used) for real-life cases. A case in point is a piece published in 2004 by Jean Bethke Elshtain, Laura Spelman Rockefeller Professor of Social and Political Ethics at the University of Chicago Divinity School.[21] Elshtain frankly acknowledges that she hadn't thought critically about torture before the events of September 11, but now that those events have occurred, she withdraws what had previously been her pre-critical view that the prohibition on torture could never be overridden.[22] More ominously, she argued that the use of 'torture lite' or 'torture 2'—'forms of coercion

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[17] Cf. the more abstract and honorable discussion of this kind of case in McMahon, 'The Paradox of Deontology' and Scheffler, 'Agent-Centered Restrictions, Rationality, and the Virtues.'

[18] Others have written about the dangers of conducting serious moral inquiry in this way: see Shue, 'Torture,' Luban, 'Liberalism, Torture, and the Ticking Bomb,' and Scheppele, 'Hypothetical Torture in the War on Terrorism.'

[19] The use of these techniques is documented in any number of sources including Mayer, *The Dark Side* and Danner, *Torture and Truth*.

[20] For the military lawyers' response, see Mayer, *The Dark Side*, pp. 213–37.

[21] Elshtain, 'Reflection on the Problem of "Dirty Hands."'

[22] Ibid., 77 and 83.

that involve "moderate physical pressure," and do no lasting physical damage'—might 'with regret be used.'[23] She said that a refusal to approve the use of these techniques is 'a form of moral laziness,' 'a moralistic code-fetishism,' or 'a legalistic version of pietistic rigorism in which one's own moral purity is ranked above other goods.'[24]

I guess I am familiar enough with my own piety and laziness (not to mention my fetishes) not to quibble with this characterization, but I wish Professor Elshtain had grappled just a little more forthrightly with the issue. She could have done so in two respects. The first would have been to acknowledge explicitly and in detail the form that these 'torture lite' or 'torture 2' techniques actually take in the real world of interrogation of terrorist suspects by U.S. agents. It is one thing to talk blandly about 'forms of psychological pressure.' It is another thing for a Professor of Divinity to approve the use of techniques that involve, for example, female interrogators straddling a Muslim subject in a lap-dancing mode, and smearing him with what appeared to be menstrual blood in the hope that if he was prevented from cleaning himself later he would feel unclean and unable to pray and that, hopefully, this would break his heart and make him more amenable to interrogation.[25] It is one thing to talk, as Elshtain does, about 'moderate physical pressure.' It is another thing to hear what this actually involved in Bagram or Guantánamo, like this from an un-named FBI agent:

> On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves, and had been left there for 18–24 hours or more... When I asked the M.P.'s what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion... the detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.[26]

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[23] Ibid., 85–7, citing also Bowden, 'The Dark Art of Interrogation,' for a very general characterization of the relevant techniques.

[24] Elshtain, 'Reflection on the Problem of "Dirty Hands," ' 86–8.

[25] This was not an instance of the kind of out-of-control abuse by National Guard reservists that happened at Abu Ghraib; this was in the course of a well-organized interrogation at Guantánamo Bay. See Saar and Novak, *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantanamo*, pp. 225–8. See also the discussion of this sort of religious abuse in Chapter 8, below.

[26] Quoted by Mark Danner in 'We are all Torturers Now,' *New York Times*, January 6, 2005.

I make no apology for the horror of these details. The horror is part of what these techniques instrumentalize, part of their alleged effectiveness, and part surely of what any honest evaluation of the likely effects of approving 'coercive techniques short of torture' should involve. I do not believe that there is anything particularly honest or courageous about approving such techniques in general terms, but declining to lower oneself to the distasteful details that, for issues like this, lie close to the heart of the matter.

The other respect in which Professor Elshtain's account could have been more thoughtful would have involved acknowledgement of and reflection upon the other terms that the law has reserved for characterizing (and prohibiting) 'techniques short of torture.' International law prohibits cruel, inhuman, and degrading treatment, and outrages upon personal dignity, even when these forms of treatment do not amount to torture.[27] These are not flip terms like 'torture lite,' and they don't just mean 'techniques short of torture.' In the prohibitions in which we find them, they are terms that convey the importance of certain standards such as basic humanity and elementary dignity. The prohibition on inhuman treatment does not just counsel us to treat detainees 'humanely' (though that is also a requirement of the Geneva Conventions). It also requires us to reflect on 'inhuman-ness.'[28] Treatment properly described as 'inhuman' is treatment so harsh or so insensitive to the needs and rhythms of human life (the need to sleep, the need to urinate or defecate) or to human vulnerability (to pain or noise or stress) that it would be wrong and unreasonable to expect any human to endure it. I wish Professor Elshtain in the vaunted honesty of her essay had been willing to reflect a little on the application of this predicate 'inhuman,' with this meaning, to the techniques whose use she approved and explain whether she was comfortable about assaults on detainees that could properly be described as 'inhuman' even if they couldn't properly be described as 'torture.' I am not talking now about legal application as such, but about the missed opportunity to engage in the sort of reflection that terms like these invite. Similarly with 'degrading treatment.' When she counseled the use of techniques that fell short of torture, did Professor Elshtain have in mind that they would be techniques properly described as 'degrading'? We know that some of the

[27] ICCP, Article 7 and Geneva Conventions, Common Article 3.

[28] For a beginning of such reflection on the meaning of 'cruel,' 'inhuman,' and 'degrading,' see Chapter 9, below.

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techniques were intended to humiliate subjects or deny them anything remotely resembling the elementary dignity of physical self-presentation. We know that some of these techniques—like torture itself—are calculated to induce regression to an infantile state or the complete domination of one's agency and consciousness by physical needs. Degradation is wrong and prohibited in these contexts because it fails to accord to people the minimal dignity associated with human personhood, the dignity that distinguishes men from animals or adults from infants. I wish the endorsement of 'torture lite' by Professor Elshtain had been associated with some reflection on the meaning of this standard, and had been accompanied either by a justification for ignoring it or by an account of how, in the real world, we might prevent 'physical coercion short of torture' from crossing the boundary into the use of human degradation as a means to our ends.

I have gone on at length about Jean Elshtain's essay because it is a fine illustration of the sort of discussion of torture and related practices that became standard among moral philosophers after September 11. As I said, I believe that the wrongness of torture was constant before and after the terrorist attacks. I don't really think philosophers like Elshtain believe that there was a change in moral reality after September 11, 2001: what they say is that September 11 afforded an opportunity to those who had previously been unthinking absolutists to focus more thoughtfully on what—they would say—turned out to have been the in-principle permissibility of torture for extreme cases even before the atrocities in New York and Washington. Torture, they would say, had always been permissible for certain cases and it was always a mistake to think otherwise. All that happened on September 11 is that we got a more vivid sense of what those cases might be.

I think people said the same sort of thing about rights in general. Some of us believe that rights are like 'trumps' over considerations of general utility or that they are side-constraints on the pursuit of the general good.[29] If these formulations mean anything, they mean that rights should have a certain resilience against campaigns for greater security, even when the exigencies of the pursuit of security change (as they did change after September 11). A commitment to rights means that we are willing to forego the increments in safety and convenience that might accrue from infringing certain liberties or basic guarantees.

[29] For these formulations, see Dworkin, *Taking Rights Seriously*, pp. xi and 190 ff. and Nozick, *Anarchy, State, and Utopia*, p. 28 ff.

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Otherwise—on this view—we show that we weren't really committed to regarding those civil liberties and protections as rights at all.

Of course it does not follow that rights are impervious against all changes in circumstances. A very great increase in the danger associated with certain rights or in the costs associated with respecting civil liberties may in some cases warrant a rethinking of the traditional formulations. The terrorists who attacked New York and Washington on September 11, 2001 took advantage of the liberties we enjoy and some of those liberties may need to be curtailed if others, following their example, are not also to take advantage of them with similar or even more terrible results. I explored this question in Chapter 2, which was written in 2002; I think of this essay as being quite crucial for the chapters that follow because it attempts to mark out some dimensions of care that we need to take seriously when we think about rights in a post-9/11 era. I have already mentioned one of them: the fact that the rethinking of some rights might be warranted does not mean that other rights, traditionally regarded by law as absolute in the sense of non-derogable, should also be made vulnerable to such rethinking. We should not rule out in advance the idea that there are certain absolute legal and moral constraints on the way we fight terrorism. Some rights were designated long ago as absolutes precisely because of the temptation to rethink them or relativize them in times of panic, insecurity, and anger.

A second point is that we need to be very careful about talk of balancing in this regard—balancing liberty against security, for example. Such talk has a treacherous logic.[30] It beckons us in with easy cases—the trivial amount of freedom restricted when we are made to take our shoes off at the security checkpoint before we board an airplane is the price of an assurance that we will not be blown up by any imitators of Richard Reid. But it is also a logic that has been used to justify unwarranted spying, mass detentions, incarceration without trial, and abusive interrogation. In each case, we are told, some things that were formerly regarded as civil liberties have to be given up in the interests of security. But after a while we start to wonder what security can possibly mean, when so much of

[30] Much of this paragraph and the paragraphs that follow are adapted from Waldron, 'Is this Torture Necessary?' (reviewing Cole and Lobel, *Less Safe, Less Free: Why America Is Losing the War on Terror*). That review was intended as a tribute to David Cole, who, very early on in the discussion of these matters, distinguished himself by refusing to accept the bromide that we were all giving up some of our freedom in order to make all of us more safe. At the end of 2002, Cole published a short piece in the *Boston Review* entitled 'Their Liberties, Our Security,' which traced not just the unequal impact but the discriminatory intent of many of the liberty-affecting measures imposed after 9/11.

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what people have struggled to secure in this country—the Constitution, basic human rights, and the Rule of Law—seems to be going out the window. I don't mean to be glib with the pun on 'security.' The topic is actually a difficult one as we navigate between a concept of security tied too tightly to physical safety and a concept of security embracing so much of what we value overall—so much of what we want to be 'secure' in the possession of—that it does not help us parse the trade-offs that may be necessary between the various goods that we are trying to secure. I pursue this matter in Chapter 4, which is devoted to an analysis of the complex meaning of 'security.'

I said the logic of balancing is treacherous. When logic betrays us, we have to retrace our steps—sometimes in a fussy and pedantic sort of way. So let us think carefully about the trade-off between liberty and security.

One crucial distinction is between intra-personal trade-offs and inter-personal trade-offs. The simplest case of an intra-personal trade-off is this. I accept the burden of a legal requirement to wear a seatbelt, restricting my freedom to sit in my car as I like, because I am convinced that this will make me safer, less liable to injury or death in the event of an accident. If we all do this, then each of us is safer though each of us is a little less free. We can think of it as a straightforward trade-off, once we understand what happens to human bodies in an automobile in a collision. It's like buying more potatoes (safety) and less meat (liberty), when we find that the price of meat has gone up. Another similar case, slightly less straightforward, is when we all accept a restriction on liberty not because our own actions pose a threat to our own safety, but because it is possible that some of us may pose a threat to the others and we don't know who. This is the logic of the airport security system; and it too seems to make innocuous sense. We all accept certain restrictions in the expectation that we will all enjoy greater security. Again, the trade-offs are intra-personal: each of us bears the cost and each of us reaps the benefits.

Quite different, however, is the *inter*-personal case, in which we sacrifice not our own liberty, but the liberty of a few people in our midst in order that the rest of us may be (or at least feel) more safe. A passenger notices some Muslim men praying before boarding an aircraft. She makes a fuss and the Muslims are removed from the flight. A little bit of liberty is lost, and perhaps a little bit of security is gained. But the person who gains the security is not the person who lost the liberty. This is utterly unlike the intra-personal trade-offs. It is a different

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game—a game of majorities and minorities—and the moral issues it gives rise to are much more serious.

It is different but of course it's not unusual. For there are winners and losers all the time in politics: a new highway benefits some restaurant owners at the expense of others whose establishments languish boarded-up along the route of the old road. But the stakes are much higher in the liberty–security trade-off. For what are traded off there are not just economic interests or mundane freedoms, like the freedom to sit without a seatbelt. Often what is traded off is something that was previously regarded as a right. Members of a minority are detained without trial, or spied upon, or beaten or humiliated during an interrogation, and all to make the rest of us more secure. This is troubling because rights are supposed to represent guarantees given to individuals and minorities about the outer limits of the sacrifices that might reasonably be required of them in others' interests. They are supposed to *restrict* trade-offs of some people's liberty and well-being for the sake of others'. They are not supposed to be traded off themselves.

It seemed to me enormously important to remember this and to remember too that this was not just a matter of trading some people's liberty for our security. Sometimes the security—indeed the safety—of outsiders or perceived outsiders was traded off as well. On July 22, 2005, a Brazilian electrician, Jean Charles de Menezes, was shot dead by police officers in Stockwell tube station on the London Underground. Those who shot him said they thought he looked and acted like one of the terrorist suspects they were watching in anticipation of a possible repetition of the attacks in London earlier that month. But Mr Menezes was not a terrorist; he was an entirely innocent and legal resident of the United Kingdom, and he was at the time doing nothing that justified firing on him. He was made radically less safe as a result of Britain's anti-terrorist measures, which included instructions to police to use deadly force to prevent perceived terrorist activity.

The same can be said about those who have been tortured and beaten—as I said earlier, in some cases beaten to death—by American security forces. The infliction of pain during interrogation renders a person not just less free—though he has to be made unfree (held down) in order to be tortured—but less secure in a very straightforward sense. The security that we all crave is security against violent attack, but that is exactly what many people lose when they are imprisoned in

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Guantánamo Bay or in 'black' U.S. prisons in Eastern Europe, or when they are 'rendered' by U.S. agents to countries like Syria for torture by foreign authorities.[31] Their security is sacrificed, allegedly in order to make the rest of us more safe.

People like Maher Arar and hundreds of others who have been abused by our interrogators are not more secure from terror as a result of the Bush administration's security strategy. On the contrary, they are terrorized by us: their terror has been instrumentalized by officials of our government supposedly for our benefit. We may be more secure as a result, but it is a shameful thing to know that our safety has been purchased at their expense on the back of a waterboard or at the end of a frayed electrical cable.

Many of us thought that the idea of justifying such trade-offs in a simple consequentialist framework had been discredited in moral philosophy years ago. Robert Nozick had reminded us in 1974 of our liberal commitment to 'the inviolability of other persons.' He asked:

> [W]hy may not one violate persons for the greater social good? Individually, we each sometimes choose to undergo some pain or sacrifice for a greater benefit or to avoid a greater harm: we go to the dentist to avoid worse suffering later; we do some unpleasant work for its results; some persons diet to improve their health or looks; some save money to support themselves when they are older. In each case, some cost is borne for the sake of the greater overall good. Why not, similarly, hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good?

His reply was stark:

> But there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others,

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[31] Consider the story of Maher Arar, a Canadian engineer, innocent of any involvement in terrorism. In September 2002, Arar was apprehended at JFK Airport while changing planes for Montreal. He was held for two weeks in Brooklyn while U.S. officials investigated charges that he had ties to Al Qaeda. Then, while his lawyer was lied to about his whereabouts, Arar was flown on a U.S. government–chartered jet to Jordan and driven to Syria, imprisoned there for a year in a grave-like cell, and tortured by Syrian authorities (for several days beaten for hours with a frayed electrical cable). The former U.S. Attorney-General Alberto Gonzales said that there were assurances from Syria that Arar would not be tortured. But this is very odd. We do not trust the Syrians' word on anything else and had the administration wanted to ensure that Arar's deportation would not result in his torture, they could have sent him to Canada, whose passport he held and where he resided as a citizen. The only conceivable reason for sending Arar to Syria was so that he would be tortured, and tortured in circumstances where no legal recourse was possible.

uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.[32]

Whatever philosophical differences there were between Nozick and his Harvard colleague, John Rawls, they were eclipsed by their consensus on this basic point: consequentialist trade-offs of one person's welfare or liberty for the sake of others, fail 'to take seriously the plurality and distinctness of individuals.' That was the basis on which political philosophy was revived in the 1970s, and yet in the debate about anti-terrorist measures I often found that people wrote insouciantly about interpersonal trade-offs in a maximizing framework.[33] It was as though no progress had been made in distinguishing consideration of one person's trade-off among various goods that he or she enjoyed, on the one hand, and the pressing issues of justice raised when there was a proposal to trade off one person's well-being for the greater good of others.

One final thing whose constancy was called into question after 2001 was our attitude to international law. The sources of international law and the basis of its applicability remained the same before and after 9/11 and, as we have seen, many of its provisions ought to have had an urgent bearing on the choices that were made in the 'war on terror.' Those who were alarmed by reports of abusive interrogations in 2002–3 cited international conventions of one sort or another, and were shocked to find that these were held largely in contempt by many of their colleagues and sizeable sections of the population. The situation was exacerbated in 2003 with American fury at the insistence of some of its traditional allies on a legalistic approach to determining the appropriateness of military action against Iran. Suddenly there were scores of books and law journal articles questioning the status of international law and calling for America to think again about what had previously been its strong commitment to international legal institutions.[34]

There is not nearly enough on this issue in the present collection. I have included one brief paper about the Rule of Law in international law, which was written for a Federalist Society student symposium at

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[32] Nozick, *Anarchy, State, and Utopia*, pp. 32–3.

[33] See, e.g. the remarks on aggregate maximization in Posner and Vermeule, *Terror in the Balance*, pp. 29–30.

[34] See, for example, McGinnis and Soman, 'Should International Law be Part of our Law?' and Goldsmith and Posner, *The Limits of International Law*.

Columbia Law School in 2006 in which the late Thomas Franck and I attempted to vindicate the demands of international law against Jeremy Rabkin and John McGinnis. It is a halting and inadequate start; clearly much more is needed.[35]

* * *

Things changed on September 11, 2001, and in the years following, the reputation of the United States in the world took a nose-dive. The United States was regarded as a 'torture state,' a repeated violator of human rights and international humanitarian law; some of its military bases were described by jurists elsewhere as 'legal black holes'; and it was seen as something like a rogue state, contemptuous in its actions and attitudes towards international law and the established opinions of mankind. Things changed again on November 4, 2008 with the election of Senator Barack Obama as President of the United States and on January 21, 2009, with his inauguration and the end of the Bush Administration. It seemed like an era of new hope, with Obama's pledge to close the detention facility at Guantánamo Bay and his initiation of an honest discussion of torture, marked by a clear acknowledgement at his 100 Days Press Conference, 'I believe that waterboarding was torture. And I think that the—and, whatever legal rationales were used, it was a mistake.'[36] Preparing this volume for publication, I had the interesting pleasure of changing many of the verb-tenses in Chapters 7 and 8 in particular from present to past tense, to mark the end of a shameful period.

But not everything changed, and not as quickly as many of us wanted. Almost a year after his election, detainees still languish at the Guantánamo Bay facility, not for any desire or policy of the President but because it has turned out to be much more difficult to relocate them. Many cannot be repatriated for fear that they will face reprisals and even worse torture at home than they faced while in American custody. Some cannot be released because we are afraid that our own abuses have radicalized them, making them hate Americans even more than they did before they were detained. If the detention facility is closed, many of the

[35] For an indication of what that 'more' might be, see Mary Ellen O'Connell, *The Power and Purpose of International Law* (Oxford University Press, 2008).

[36] See the following websites: <http://www.reuters.com/article/idUSN29465634> and <http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-4/29/2009/>.

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most dangerous terrorist suspects will have to be detained in the United States, and a number of local communities near secure federal prisons have said that they are too frightened to countenance the presence of terrorist suspects in their vicinity. At the time of writing (November 2009), there are plans to put some of the suspects on trial in federal court in New York City. This too has proved controversial, though it is a welcome return to the criminal justice model, to address the mass murders that took place on September 11—a welcome move away from the 'act of war' approach which landed us in such difficulties (labeling those who conspired to hijack airplanes as 'unlawful combatants,' and grudgingly allowing them hearings before 'military commissions').[37] It remains to be seen what effect the maltreatment of these detainees will have on their trial for conspiracy to murder. It may not be the most important of the pragmatic arguments against torture, but it is a significant argument against it that, for some putative short-term gain in information, it can play serious havoc with our ability to deal justly and properly with a terrorist conspirator once his informational value has been exhausted.

There is the further question of what the Obama administration should do about the misdeeds of its predecessors—the official authorization of abusive and unlawful interrogations, the maltreatment and in some cases the murder of prisoners, the egregious and repeated violations of standards set by international human rights, international humanitarian law, U.S. constitutional requirements, U.S. statutes, and military discipline, and the attempt by civilian lawyers in the administration to deliberately distort the framework of law that is supposed to govern these matters. Those who participated in unlawful interrogations must accept responsibility; their guilt is in no way diminished by the greater and additional culpability of their superiors. And the culpability of their civilian superiors, reaching up into the highest levels of the Bush administration, is heavy indeed. Former officials like David Addington, Jay Bybee, George W. Bush, Dick Cheney, Alberto Gonzalez, Jim Haynes, Donald Rumsfeld, and John Yoo should be regarded as, at the very least, under suspicion of having engaged in conspiracy to torture and conspiracy to violate applicable U.S. laws. Whether it is appropriate to contemplate prosecutions against these suspects is another question.

[37] On October 4, 2001, The *London Review of Books* published 29 very short comments by various contributors, entitled '11 September.' I looked back recently at my contribution, written in haste for that issue, and was glad to see that, like several of my fellow authors (Thomas Powers and David Runciman, for example) I criticized as ill-advised the characterization of the 9/11 attacks as acts of war.

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Attorney-General Eric Holder is conducting an investigation, as he is required to do by international law.[38] And other agencies, such as the Office of Professional Responsibility, are investigating the work done in the Department of Defense and in the Justice Department's Office of Legal Counsel in connection with the infamous 'torture memos.' There is some enthusiasm elsewhere in the world for trials to be conducted outside the United States along the lines of the *Pinochet* case in England in 2000[39] or along the lines of a recently completed hearing in Italy, in which 23 former CIA agents were sentenced *in absentia* to eight years' imprisonment for the kidnapping and rendition (from Aviano airbase in Italy) to Egypt of a Muslim cleric suspected of recruiting militants for Iraq.[40] Hopefully this will make some of the officials under suspicion for conspiracy to torture at Guantánamo and elsewhere think twice before they book their foreign holidays.

In the end the decision to prosecute any of the Bush administration officials is a matter of political judgment. I do not mean that it should be determined by partisan political advantage, but by considerations about the state of the republic and whether it can bear the cost and divisiveness of hearings and trials on this matter. For what it is worth, I see this as a most difficult decision. On the one hand, one has to consider the likely intensification of the already bitter and potentially violent divisions in the polity should action of this kind be undertaken by President Obama and the Attorney-General. On the other hand, it would be a pity if the sort of thing that went on in the Office of Legal Counsel, the Office of the Vice President, and the Pentagon in 2002–7 came to be regarded by future administrations and their appointed officials as privileged and invulnerable, so that no one need worry now or in the future about

[38] Article 12 of the Convention Against Torture, which the United States has signed and ratified, requires each signatory state party to 'ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.'

[39] See *R v. Bow St Metropolitan Stipendiary Magistrate, ex parte Pinochet* (No. 3), [2000] 1 A.C. 147, 198 (H.L. 1999), stating that '[t]he jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed'. See also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), noting 'the general recognition since [1945] that there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation,' and *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), stating that 'the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.'

[40] See Manuela D'Alessandro and Daniel Flynn, 'Italy convicts former CIA agents in rendition trial,' *Reuters*, November 4, 2009, at <http://www.reuters.com/article/topNews/idUSTRE5A33QB20091104>.

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either torturing detainees, or approving such torture, or legally certifying it, or needlessly muddying the framework of applicable law. Though it cannot continue, the present uncertainty has advantages of its own, and any decision not to prosecute should be presented to the public as a delicate upshot of judgment, rather than as an indication that prosecutions are and always were out of the question. A decision not to proceed further against Addington et al. will be disappointing to many. Some may say that it is bound to undermine the standing of the laws that, arguably, were broken. But that invests too much hope in the dramatics of criminal trials. Law has a presence and a resilience that goes beyond simple models of enforcement. In the case of the laws against torture and cruel, inhuman, and degrading punishment, the most important fact about their presence is the incorporation of those laws into the mentality and habits of those called to public political or military service. It is not something that depends wholly on fear of prosecution; often it is a matter of professionalism and honor. That is what it looked like we lost in 2002–5; but I believe it is something we can get back, by our experience of having stepped into that abyss and our relief as a nation at being taken seriously in the world when we say, yet again, that this is not someplace we want to go.

The essays in this volume were written mostly in the period 2002–7. Chapter 7, the long chapter on torture, was published originally with the subtitle 'Jurisprudence for the White House.' I have chosen a variation of that subtitle for the whole collection, because I think the considerations set out in these essays are of enduring importance. We should not expect the threat of terrorist attack to evaporate, nor the need for precautions against attack whether large or small. And if precautions continue to be necessary, then vigilance is also needed to ensure that the precautions we take are regulated by moral, legal, and constitutional constraints. It would be arrogant to regard the positions taken in these essays as the final word on these constraints. There are other opinions around and they are certain to make themselves heard. Still, it is important to bear witness to certain considerations that, as events have shown, are always in danger of getting lost in the rage that afflicts a country when its citizens come under attack: the inviolability of the individual, the complexity of security, the abomination of torture, the importance of humanity and dignity in our response to terrorism, and above all the integrity of law.

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