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Torture and the War on Terror: We Must Not Add Dirty Rules to Dirty Hands

The question of torture arises once again in the context of the War on Terror and has been brought to public controversy with the amendment to the current Defense Authorization Bill sponsored by Senator John McCain. The measure, which would render illegal all “cruel, inhuman, or degrading” treatments of prisoners under U.S. control, passed by a vote of 90-9 in the full Senate. President George W. Bush had threatened to veto the legislation, if it were to be passed by the House of Representatives. On December 15, the White House announced that it would back the McCain amendment.

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Looking back at World War I, Winston Churchill was moved to write: “When all was over, torture and cannibalism were the only two expedients that the civilized, scientific, Christian states had been able to deny themselves: and these were of doubtful utility.” The “Great War” was a laboratory for human killing, with the first widespread use of mechanized weapons of mass murder like the machine gun and the tank. Accompanying these weapons were inventions such as aerial bombardment and poison gas. Yet, the war saw neither side institutionalize the use of torture. In the end, that was about all Churchill could claim on behalf of military restraint.

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Nevertheless, public debate over the amendment – and the issues of coercion and torture – will not end with the conclusion of this political drama, nor should it. This is a vital issue of great moral consequence, and this debate should not be allowed to slip from public view. All citizens bear responsibility to be informed and engaged concerning this question.

This debate was advanced through the contribution of columnist Charles Krauthammer and his article, “The Truth About Torture,” published in the December 5, 2005 issue of *The Weekly Standard*. Krauthammer, a morally serious man, presents a morally serious argument against the McCain amendment – going so far as to suggest that McCain’s position is something less than intellectually honest.

Both men deserve careful attention. Sen. John McCain is a man whose courage was demonstrated through the awful experience of imprisonment and torture at the hands of the North Vietnamese regime. Torture and the treatment of prisoners of war is no hypothetical issue to this senator. At the same time, Charles Krauthammer also deserves a respectful hearing. His background in medicine and the law, coupled with his own public courage and service as a member of the President’s Council on Bioethics, summons our attention.

Krauthammer argues that “there is no denying the monstrous evil that is any form of torture,” nor “how corrupting it can be for the individuals and society that practice it.” But, he also believes that there are exceptions to this rule, and that these exceptions demand the discipline of rules.

“The problem with the McCain amendment,” he asserts, “is that once you have gone public with a blanket ban on all forms of coercion, it is going to be very difficult to publicly carve out exceptions.” Krauthammer then faults the Bush administration for “having attempted such a codification with the kind of secrecy, lack of coherence, and lack of strict enforcement that led us to the McCain reaction.”

Without doubt, the scandals associated with prisoner abuse at Abu Ghraib and the advice offered in the memo prepared by John Loo of the Office of Legal Counsel in the Department of Justice have caused considerable embarrassment to the United States. Are we a people who would allow torture to be used as an instrument of state power? More to the point, has the War on Terror changed the rules?

Krauthammer argues that the rules have indeed changed. Captured terrorists, he argues, are not soldiers captured in a conflict of arms, but something more like dangerous criminals who break the laws of war by killing and abusing civilians “for a living.” Therefore, they are entitled “to nothing” in terms of rights, having forfeited such claims by becoming terrorists. And yet, he does not actually believe that they are entitled to *nothing*, for he would not sanction any and all uses of coercion and torture, just those that fit his description of exceptional cases.

“Torture is not always impermissible,” Krauthammer allows. “However rare these cases, there are circumstances in which, by rational moral calculus, torture not only would be permissible but would be required (to acquire life-saving information). And once you’ve established the principle, to paraphrase George Bernard Shaw, all that’s left to haggle about is the price.”

McCain agrees, to a point. After all, he also accepts that exceptions will, even *must* be made under exceedingly rare circumstances. The difference between these two proposals is a distinction worthy of our most serious moral scrutiny and review. In the end, I must side with McCain, but not without further moral clarifications.

McCain and Krauthammer are both talking about coercion and torture for the purpose of acquiring vital information that would conceivably save lives – and for no other purpose. But when they speak of coercion and torture, do they mean the same things? Coercion is a normal device for obtaining information in many contexts, including routine police interrogations. Of course, the coercive techniques of normative police policy in the U.S. do not include the use of physical torture. Yet, some international agencies and policy groups define virtually any high-pressure interrogation or psychological techniques as torture. I agree with Jean Bethke Elshtain when she suggests that those who advocate such expansive claims make “minciment” of vital terms and categories. She rightly suggests that sleep deprivation and a slap in the face belong in a category altogether separate from bodily amputations and sexual assault.

Definitions represent the first great challenge. Some human rights activists contend that yelling at a prisoner represents the kind of “cruel, inhuman, or degrading” treatment McCain would categorically outlaw. Furthermore, some of the techniques used in the interrogation of terrorists are also used on American military personnel in the course of intensive training. Does this represent torture? Surely not.

Under certain circumstances, most morally sensitive persons would surely allow interrogators to yell at prisoners and to use psychological intimidation, sleep deprivation, and the removal of creature comforts for purposes of obtaining vital information. In increasingly serious cases, most would likely allow some use of pharmaceuticals and more intensive and manipulative psychological techniques. In the most extreme of conceivable cases, most would also allow the use of far more serious mechanisms of coercion – even what we would all agree should be labeled as torture.

In his article, Krauthammer proposes the “ticking time bomb” scenario as an example of a context in which the most serious and extreme measures would be authorized. In such a scenario, agents of the state would hold in custody a terrorist who knows where a ticking time bomb has been hidden – a bomb that will surely detonate and kill thousands of innocent persons. Under such a circumstance, Krauthammer argues, the use of extreme coercive measures would be legitimate, even necessary. The greater good of saving lives trumps the principle of state restraint.

A similar scenario may hit even closer to home for most persons. Consider the hypothetical case in which a kidnapper, now in police custody, knows where a child has been hidden in a subterranean vault with limited oxygen. He refuses to disclose the child’s location, knowing that the possession of this information will serve as proof of his guilt. Time is running out and the child will soon die if the location is not found. So, what parent would not authorize the use of almost any mechanism of coercion in this case – even the most extreme? In such a case, the parent would agree with

Krauthammer that the kidnapper has forfeited all claims upon psychological peace and physical comfort – even upon life itself – by refusing to save the child he has kidnapped.

Yet, even as morally serious persons might justify such actions, the use of these hypothetical scenarios is not fully satisfying. In reality, the real-life situations in which such decisions are made are rarely so clearly defined. Is this really the kidnapper? Do we really know that this captured terrorist knows where the bomb is located? Are we certain that a bomb exists?

Moral cowards duck these questions even as the morally unserious dismiss them. This is not an option for Christians who would think seriously about this urgent question. I would argue that we cannot condone torture by codifying a list of exceptional situations in which techniques of torture might be legitimately used. At the same time, I would also argue that we cannot deny that there could exist circumstances in which such uses of torture might be made necessary.

McCain wants a categorical ban, but accepts that exceptions may, under extreme situations, be made. Krauthammer wants to define the exceptions so that a policy may be more coherent and, in his view, honest. Others, such as Harvard law professor Alan Dershowitz, suggest that specific processes be put into place that would allow for the authorization of such techniques of coercion, going so far as to suggest something like a “warrant” for torture “to be required as a precondition to the infliction of any type of torture under any circumstances.”

This appears to be neither practical nor prudent, for the circumstances in which such a use of coercion might be conceived would often not allow time for such a warrant to be issued. The War on Terror is not fought on convenient terms. Furthermore, institutionalizing torture under such a procedure would almost surely lead to a continual renegotiation of the rules and constant flexing of the definitions.

We are simply not capable, I would argue, of constructing a set of principles and rules for torture that could adequately envision the real-life scenarios under which the pressure and temptation to use extreme coercion would be seriously contemplated.

Instead, I would suggest that Senator McCain is correct in arguing that a categorical ban should be adopted as state policy for the U.S., its military, and its agents. At the same time, I would admit that such a policy, like others, has limitations that, under extreme circumstances, may be transcended by other moral claims. The key point is this – at all times and in all cases the use of torture is understood to be morally suspect in the extreme, and generally unjustified.

Of course, my understanding is based in an Augustinian conception of human nature and sinfulness. At our best, we are sinners whose sin contaminates our highest aspirations and most noble actions. As Augustine argued, the Christian soldier may kill enemy combatants as a matter of true necessity, but he can never assume that in doing so he has not sinned. Augustine’s “melancholy soldier” knows that the use of deadly force against another human being is, generally speaking, sin. Yet, he also knows that a failure or refusal to kill can at times be a sin worse in both intention and effect than a decision to kill in order to save lives. In a very real sense, that soldier cannot privilege his desire to be free from the sin of killing another human being to supersede his responsibility to save the lives of innocents. As philosopher Michael Walzer argues, this is the perennial problem of “dirty hands.” The honest soldier knows this problem all too well – as does the interrogator.

Rules institutionalize a reality and shape a society. The safe transit of automobiles requires a set of well-established, public, and intelligible traffic laws, including speed limits. At the same time, a parent rushing a bleeding child to the hospital may be stopped by a police officer, but such a parent is not likely to be arrested and prosecuted for breaking this law. Why? Because the parent’s action, under a set of unexpected but conceivable conditions, was understood by legal authorities to have been justified under this precise set of circumstances. The government does not stipulate in advance that such a set of allowable conditions exists, nor does it attempt to exhaust in advance what circumstances might exist that would be similarly justified. Instead, the law is understood to remain in full effect with full integrity even as legitimate and authorized legal agents decide not to arrest or prosecute a citizen whose law-breaking was understood to be justified under these precise circumstances. The rule is unchanged, and the law is not mocked.

Similarly, the practice of medicine involves the physician’s responsibility to make split-second life and death decisions in the course of medical extremity. No precise set of laws, rules, or regulations can be set forth in advance, even as principles and best practices for medical practice are standardized. One simply cannot remove the physician as a

responsible moral agent in the actual context of medical practice – even and especially in emergency cases. Yet, medical review boards exist to review the physician’s decisions and actions in retrospect.

These two contexts of moral decision-making can serve to develop a coherent and principled policy on the state’s use of torture and extreme coercion. First, the use of torture should be prohibited as a matter of state policy – period. No set of qualifications and exceptions can do anything but diminish the moral credibility of this policy. At the same time, rare exceptions under extreme circumstances can be considered under those circumstances by legitimate state agents, knowing that a full accounting of these decisions must be made to the public, through appropriate means and mechanisms.

Second, a thorough and legitimate review must be conducted subsequent to the use of any such techniques, with the agents who authorized or conducted such use of torture fully accountable, even to the point of maximum legal prosecution if their use of extreme coercion is seen to have been unjustified (not simply because the interrogation did not produce the desired information, but because the grounds of justification were invalid). The absence of legitimate accountability through a thorough and comprehensive process of review – with the threat of real and appropriate sanctions against those found to have acted without due justification – makes the state complicit in a web of cruelty and the official rationalization of evil.

We live in a fallen world threatened by agents of terror who are changing the reality of war and would end civilization as we know it, killing noncombatants without conscience as a matter of pride. In confronting this new form of evil, we are now forced to rethink many of the most settled questions of morality and the use of force. Nevertheless, we have no choice but to fight this foe and to wage war on those who would use mass murder and terror to sever the fragile bonds of human society. Yet, in fighting this war it is inevitable that we will look down and find dirty hands, even in doing what we would all agree is a lamentable necessity. What we must not do is compound the problem of dirty hands by adopting dirty rules.

