

THE UTILITARIAN RATIONAL CHOICE OF INTERROGATION FROM A HISTORICAL PERSPECTIVE

ROBERT BEJESKY†

I. INTRODUCTION.....	328
II. UTILITARIAN RATIONAL CHOICE	330
A. <i>Legal Bases</i>	330
1. <i>Self-Defense, Defense of Others, and President's</i> <i>"Inherent Authority"</i>	330
2. <i>Legal Prohibitions</i>	332
B. <i>Utilitarian Balancing Approaches</i>	335
1. <i>An Equation</i>	335
2. <i>The Highest Risk: The Ticking Time Bomb</i>	336
C. <i>Skeptical Commentators</i>	340
1. <i>A Propensity to Exaggerate</i>	340
2. <i>Eliciting Falsities</i>	342
D. <i>Concluding Points</i>	347
III. THE HISTORY OF CIA METHODS.....	347
A. <i>Legality and Effectiveness of Present-Day Methods</i>	347
B. <i>A Three-Step Approach</i>	350
1. <i>The Research Agenda</i>	350
2. <i>Sensory Isolation</i>	351
a. <i>The Origin of the Research</i>	351
b. <i>Pushing Sensory Deprivation with Technology and</i> <i>Drugs</i>	353
c. <i>CIA Funding and the Lawsuits</i>	355
3. <i>Self-Inflicted Pain</i>	358
4. <i>Adherence to Authority</i>	359
a. <i>Stanley Milgram's Research</i>	359
b. <i>Consequences of the Study</i>	361
5. <i>Purported Deeper Conformity and the Cold War</i>	364
a. <i>Hypnosis</i>	364
b. <i>Real or Propaganda?</i>	366
IV. IMPLEMENTING RESEARCH	369
A. <i>MKUltra: Using Drugs in Interrogation</i>	369
1. <i>A Secret and Controversial Agenda</i>	369
2. <i>Records and Investigations</i>	370
a. <i>MKUltra</i>	370
b. <i>CIA Drug Experiments</i>	372
3. <i>Remembering Facts or Crafting Fantasy: What Did the</i> <i>CIA Learn?</i>	374
4. <i>The Case of Frank Olson</i>	377

5. <i>Post-9/11 Interrogations</i>	381
B. <i>The Kubark Interrogation Manual and Medical Science</i>	383
1. <i>A Standard Approach Commencing with Sensory Depravation</i>	383
2. <i>Self-Inflicted Pain</i>	385
3. <i>Kubark Methods after 9/11 and Bush Administration Directives</i>	386
a. <i>Military Chain of Command</i>	386
b. <i>CIA Authorizations</i>	390
4. <i>Medical Conditions</i>	392
V. <i>OTHER FOREIGN INTERROGATION OPERATIONS</i>	394
A. <i>The CIA in Vietnam</i>	394
1. <i>The Phoenix Program</i>	394
2. <i>Critics and Whistleblowers</i>	397
B. <i>Latin America</i>	398
1. <i>Wider Use of Interrogation Approaches: The Pentagon's Project X</i>	398
2. <i>FM 34-52</i>	401
3. <i>The CIA in South America</i>	403
C. <i>Britain and Northern Ireland</i>	405
1. <i>The Atrocious Event and Impact on Victims</i>	405
2. <i>Consistency with CIA Approach and Similar Rationales to Avoid Responsibility</i>	408
3. <i>The Convention Against Torture</i>	411
VI. <i>CONCLUSION</i>	413

I. INTRODUCTION

Kathleen Taylor, a research scientist at Oxford University, remarked that "an influence attempt may change the inner world in many ways, from the lightest persuasion . . . to the catastrophic coercion of forceful brainwashing."¹ Governments have historically employed abusive

† B.A. Business Administration, 1992, *summa cum laude*, Saginaw Valley State University; J.D., *cum laude*, 1994, Thomas M. Cooley Law School; L.L.M. International Law, *with distinction*, 1996, Georgetown University Law Center; M.A. Political Science, 2002, University of Michigan; M.A. Applied Economics, 2002 University of Michigan. The author has taught international law courses for Cooley Law School and the Department of Political Science at the University of Michigan, American Government and Constitutional Law courses for Alma College, and business law courses at Central Michigan University and the University of Miami. The author would like to express his sincere gratitude to the editors at the Wayne Law Review for their exceptional textual suggestions and punctilious footnote work.

coercion to oppress, punish, or intimidate society,² and oppressively interrogated detainees to obtain information on utilitarian grounds to prevent danger to society. The latter was the recent intention when top Bush Administration officials explicitly sanctioned interrogation tactics that are illegal under international law, including the use of vicious dogs, stress positions, nudity, isolation, sleep deprivation, threats, and waterboarding.³ Legal advisors avoided interpreting cruel and unusual punishment restrictions on interrogations, thus giving interrogators discretion to do what they assumed was necessary.⁴ Proponents insisted that uncomfortable methods inflicted on detainees were not life-threatening,⁵ and detractors countered by maintaining that the treatment was traumatic, and did not provide intelligence that revealed palpable danger to society.⁶ Despite debate, "torturers" executed the practices with a personal conception of being patriots for the common good, and as devotees to "deliver[ing] the blind ignorant majority from violence and anxiety."⁷

This Article explores the historical development and use of psychological interrogation. Part II ponders the polarizing positions in the context of the utilitarian basis for carrying out abusive practices during the so-called "war on terror." Part III discusses the CIA's

1. KATHLEEN TAYLOR, *BRAINWASHING: THE SCIENCE OF THOUGHT CONTROL* 96 (2004).

2. *Id.* at 26; Memorandum from General James T. Hill for Chairman of the Joint Chiefs of Staff, Washington, D.C. (Oct. 25, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 223 (Karen J. Greenberg & Joshua L. Dretel eds., 2002) (Bush Administration memo specifying that harsh interrogation was designed to "maximize the value of our intelligence collection mission"); SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 20 (2004); Seth F. Kreimer, "Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience, 1 J. NAT'L SECURITY L. & POL'Y 187, 212 (2005) (defining torture as "an infringement designed to produce pain sufficient to loosen the tongue of its victim").

3. Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1245 (2005).

4. Memorandum from Alberto J. Mora, Gen. Counsel of the Navy, to Inspector Gen., Dep't. of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues 8 (July 7, 2004); David Johnson, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=print> ("That 2001 directive did not spell out specific guidelines for interrogations").

5. Christopher J. Einolf, *The Fall and Rise of Torture: A Comparative and Historical Analysis*, SOCIOLOGICAL THEORY, June 2007, at 101, 103.

6. Mark A. Costanzo & Ellen Gerrity, *The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate*, 3 SOCIAL ISSUES AND POLICY REVIEW 179, 183 (2009).

7. Ariel Dorfman, *Foreward* to *TORTURE: A COLLECTION* 16 (Sanford Levinson, ed., 2004).

scientific research programs that generated psychological interrogation methods, and Part IV provides examples of implementation. Given the CIA's research, past use, potential harm to innocent detainees, and compromise of American values, were these coercive interrogation techniques justifiable for any stated purpose?

II. UTILITARIAN RATIONAL CHOICE

A. Legal Bases

1. Self-Defense, Defense of Others, and President's "Inherent Authority"

The Constitution grants the President an inherent authority to defend the nation from imminent danger, and the President's Oath of Office states that the Executive must preserve and protect the nation; but how far can assertions of preemptive self-defense or necessity be legitimately advanced as a justification for authorizing harsh interrogation practices?⁸ Professors Bagaric and Clarke explain that torture can reveal vital information because "[h]umans have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of the torturer to avoid pain. Often even the threat of torture alone will evoke cooperation."⁹ Professor Radsan maintained: "To say torture never works is naïve. People do crack."¹⁰ Torture was allegedly successful in Northern Ireland and Algeria.¹¹ The [Bush] White House alleged that the CIA's interrogation techniques disrupted serious terrorist attempts. According to the Bush administration:

[I]nterrogation by [the] CIA has often preempted serious terrorist attempts. For example, the interrogation of Abu Zubaydah and Ramzi Binalshibh helped to break up a cell of Southeast Asian

8. U.S. CONST. art. II, § 1, cl. 7; Michael Stokes Paulsen, *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258 (2004) ("[T]he Constitution either creates or recognizes a constitutional law of necessity, and appears to charge the President with the primary duty of applying it and judging the degree of necessity" under specific circumstances).

9. Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstance in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581, 588-89 (2005).

10. A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1256 (2006).

11. Jeannine Bell, *"Behind This Mortal Bone": The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 353 (2008).

terrorist operatives preparing attacks in the United States, foil an al Qaeda operation to develop anthrax, expose planned strikes on a U.S. Marine camp in Djibouti, as well as on the U.S. Consulate in Karachi, and finally thwarted plots to hijack passenger planes and to fly them into installations and buildings at Heathrow Airport and in London's Canary Wharf.¹²

In 2008, Bush vetoed a congressional bill requiring the CIA to comply with the U.S. Army Field Manual on Interrogation,¹³ and stated that "some interrogation techniques had been useful in obtaining information used to protect the United States from terrorist attacks."¹⁴ CIA Director Tenet defended approaches because there were purportedly secretive reports of "nuclear weapons in New York City, apartment buildings that are gonna be blown up," and other plots that left the CIA "struggling to find out where the next disaster is going to occur."¹⁵ After Khalid Shaikh Mohammed was "waterboarded," Vice President Cheney stated that "[h]e and others were questioned at a time when another attack on this country was believed to be imminent. It's a good thing we had them in custody, and it's a good thing we found out what they knew."¹⁶ CIA Director Hayden expounded that "our careful, professional questioning of those men has produced thousands of intelligence reports, revealed priceless insights on al Qaida's operations and organization, foiled plots and saved innocent lives."¹⁷ Addressing European leaders

12. Ingrid Deter Frankopan, *Extraordinary Rendition and the Law of War*, 33 N.C.J. INT'L L. & COM. REG. 657, 684-85 (2008).

13. Daniel Schorn, *60 Minutes, George Tenet: At the Center of the Storm*, CBS NEWS (Apr. 26, 2007), http://www.cbsnews.com/2102-18560_162-2728375.html?tag=contentMain;contentBody.

14. John J. Gibbons, *Commentary on the Terror on Trial Symposium Review of Litigation*, 28 REV. LITIG. 297, 297, 299 (2008).

15. Schorn, *supra* note 13.

16. David Stout & Scott Shane, *Cheney Defends Use of Harsh Interrogations*, N.Y. TIMES (Feb. 7, 2008), <http://www.nytimes.com/2008/02/07/washington/07cnd-intel.html>; Michael P. Scharf, *War Bound by Law: Non-State Actors and the Law of Armed Conflict in the Twenty-First Century, The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 390 (2010) (Cheney explaining that "[w]e also have to work through sort of the dark side . . . It is a mean, nasty, dangerous, dirty business out there, and we have to operate in that arena.").

17. William Douglas & Jonathan S. Landay, *Bush Bars CIA from Using Torture, but Details Remain Cloudy*, MCCLATCHY NEWSPAPER, July 20, 2007, <http://www.mcclatchydc.com/2007/07/20/v-print/18244/bush-bars-cia-from-using-torture.html>; Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 324 (2006) (noting conservative scholars "argue that the government has struck the correct balance between liberty and security without exceeding the boundaries of executive power").

and their criticism of secret U.S. prisons in Europe, Condoleezza Rice remarked that intelligence gathered from these interrogations "has stopped terrorist attacks and saved innocent lives in Europe as well as the United States."¹⁸

In *Boumediene v. Bush*, the majority of the Supreme Court overruled the Bush Administration detention practices, and affirmed the right of habeas relief for detainees.¹⁹ However, in dissent, Justice Scalia wrote that "[t]he Nation will live to regret what the Court has done today" because the decision "will almost certainly cause more Americans to be killed."²⁰ Similarly, in *Rasul v. Bush*, Justice Scalia explained that the majority "springs a trap on the Executive" by extending U.S. oversight over Guantanamo, which was "an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field."²¹ The divergence in opinion was reminiscent of the Supreme Court's conservative/liberal division following McCarthyism.²²

2. Legal Prohibitions

Despite the Bush Administration's allegations of needing to use harsh interrogation for national defense, international and domestic law decidedly forbid government authorities from using abusive tactics and torture, and there is no viable exception. Criminal law furnishes the most germane criterion for self-defense and necessity, but to invoke an exculpatory justification, the potential harm must be known,²³ and the

18. Joel Brinkley, *U.S. Interrogators Are Saving European Lives, Rice Says*, N.Y. TIMES (Dec. 6, 2005) <http://www.nytimes.com/2005/12/06/international/europe/06rice.html>.

19. Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18, available at <http://www.nybooks.com/articles/archives/2008/avg/14/why-it-was-a-great-victory/> ("The Supreme Court has now declared that this shameful episode in our history must end.").

20. *Boumediene v. Bush*, 553 U.S. 723, 828, 850 (2008) (Scalia, J., dissenting).

21. *Rasul v. Bush*, 542 U.S. 466, 489, 497-98 (2004).

22. See, e.g., *United States v. Dennis*, 341 U.S. 494, 511 (1951) (Chief Justice Vinson calling communism a "highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action."); Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. (forthcoming 2012) (manuscript at 26-29, 35-37); Irene Zubaida Khan, *The 2007-2008 Mitchell Lecture: The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 9 (2008) (quoting Justice Brennan who stated that "After each perceived security crisis ended, the U.S. remorsefully realized that the abrogation of civil liberties was unnecessary.").

23. THE COMM. ON INT'L HUMAN RIGHTS, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"*, 60 THE RECORD 13, 186

defenses are available only for homicide and assault.²⁴ Necessity is not a defense in the U.S. Uniform Code of Military Justice,²⁵ the Geneva Conventions, or International Humanitarian Law, and military necessity is only available for identifiable risks in combat.²⁶ This possibility is altogether inapplicable to interrogation. The Reagan Administration broached that the non-derogation provision of Article 2 in the Torture Convention “does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others,” but the Senate rejected that interpretation.²⁷

There was a myth that circulated involving the Bush White House supposedly exempting the CIA from criminal laws that prohibit interrogating terror suspects outside the U.S. with methods that would be unconstitutionally abusive inside U.S. borders.²⁸ In reality, Bush had no authority to “exempt” the CIA from *jus cogens* crimes.²⁹ Moreover, the same legal standards preclude government officials from perpetrating human rights violations at the domestic and international levels.³⁰ Article 7 of the International Convention on Civil and Political Rights states: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”³¹ The U.S. reservation states that Article 16 is only binding on the U.S. to the extent that ““cruel, inhuman or degrading

(2005). The Supreme Court has not overtly rejected cases of necessity, but noted that it is unlikely that necessity would be available for statutory federal crimes, as opposed to the common law. *Id.* at 183.

24. *Id.* at 187.

25. *Id.* at 184.

26. O’Connell, *supra* note 3, at 1245; THE COMM. ON INT’L HUMAN RIGHTS, *supra* note 23, at 184.

27. George P. Shultz, *Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Letter of Submittal to the President*, May 10, 1988, reprinted in *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. TREATY DOC. NO. 100-20, at 6 (1988).

28. Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn’t Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17.

29. Robert Bejesky, *Pruning Non-Derogative Human Rights Violations into an Ephemeral Shame Sanction*, 58 LOY. L. REV. (forthcoming 2013) (manuscript at 32) (on file with author).

30. Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT’L L. 642, 644 (2005) (noting that the Eighth Amendment was being abused, and testifying to the Committee Against Torture in Geneva in 2000, stating “Our country was founded by people who sought refuge from severe repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights.”).

31. International Covenant on Civil and Political Rights art. 7, adopted Dec. 19, 1966, 999 U.N.T.S. 171, art. 7 (entered into force Mar. 23, 1976) (U.S. ratification on Sept. 8, 1992).

treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."³² For more than a century, the Supreme Court has held that "punishments of torture . . . [are] unnecessary cruelty," consistent with "[w]anton infliction of pain," which is prohibited under the Eighth Amendment.³³ Professor Alan Dershowitz contends that psychological interrogation methods would not violate the Eighth Amendment.³⁴

Specifically in war zones, the Geneva Conventions, which are customary international law and applicable to armed combat, consummately proscribe the use of all pressure tactics to obtain information, and the military can only request basic information such as name and military status from a captured enemy.³⁵ Law review articles abounded with discussions that defined the word "torture," apparently because that was the term incorporated into Bush Administration legal advisory memos, which was a "bait-and-switch" of the applicable standard.³⁶ The Geneva Conventions prohibit interrogation to acquire intelligence.³⁷ Professor Mary Ellen O'Connell correctly references the obligatory law and wrote that "the United States must respect limits far short of torture in the conduct of interrogations. The United States may not use any form of coercion against persons detained in armed conflict, nor may it engage in cruel, inhuman, or degrading treatment at any time."³⁸

In an intense *60 Minutes* interview during April of 2007, former CIA Director Tenet retorted criticism by defending the CIA's "enhanced interrogations techniques" and asserting that the CIA does not torture people.³⁹ There is a distinction between physical and psychological

32. 136 CONG. REC. S17, 486-01 (daily ed., Oct. 27, 1990).

33. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

34. ALAN DERSHOWITZ, *WHY TERRORISM WORKS* 136 (2002).

35. Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 12, 1949, 6 U.S.T. 3316 ("No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."); Aaron E. Garfield, Note, *Bridging a Gap in Human Rights Law: Prisoner of War Abuse as "War Tort"*, 37 GEO. J. INT'L L. 725, 748-49 (2006).

36. O'Connell, *supra* note 3, at 1241 ("The creation of the myth that some persons have no IHL protections apparently laid the foundation for the torture, coercion, and abuse of persons in United States detention.").

37. *Id.* at 1246.

38. *Id.* at 1233.

39. Schorn, *supra* note 13.

abuse. For example, the Abu Ghraib photos were reprehensible.⁴⁰ All of the acts exhibited emotional and psychological abuse and humiliation, but not all visuals depicted physical torture.⁴¹ Under international law, significant physical abuse is more prone to be torture, while psychological abuse is at least prohibited cruel and humiliating conduct and may rise to the level of torture.⁴² Regardless, whether inside the U.S. or outside the U.S., or inside or outside a war zone, international law forbids both.⁴³

B. Utilitarian Balancing Approaches

1. An Equation

Scholars were strident in deeming severe interrogations morally perverse and impermissible under all circumstances.⁴⁴ From this perspective, whether interrogators procure reliable information is immaterial.⁴⁵ For argument's sake, let us assume that there is some appreciable utilitarian value that might validate committing the crime of torture. One might balance the "expected efficacy of torture," gravity of the threat,⁴⁶ the compromise to American values,⁴⁷ and the harm generated if torture is extrapolated into a widespread policy on the

40. Bejesky, *supra* note 29, at 2-3.

41. *Id.* at 20.

42. *Id.*; *See infra* Part IV(B)(3)(4), V(C).

43. Bejesky, *supra* note 29, at 5, 11.

44. Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1, 38 (2008) ("Righteousness is not a requirement for protection from torture or terror, nor is it a justification for performing either."); Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1269-70 (2005) ("[T]orture should never be engaged in because it [is] wrong, ineffective, and counterproductive.").

45. Gregory E. Maggs, *Responses to the Ten Questions*, 35 WM. MITCHELL L. REV. 5079, 5079-80 (2009) (arguing the U.S. should not detain prisoners at all because even if they have intelligence, the cost is too high); O'Connell, *supra* note 3, at 1256 ("It should be completely irrelevant to Americans that coercive interrogation can result in useful information. The practice is unlawful and we are a nation under law that does not engage in unlawful practices as a matter of official policy.").

46. Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION, *supra* note 7, at 293-98 (Sanford Levinson ed., 2004) ("The less certain is the need for or the expected efficacy of torture, the more lives have to be at risk to justify [using torture].").

47. Memorandum from Rear Admiral Michael F. Lohr, Judge Advocate Gen., U.S. Navy, for Gen. Counsel, U.S. Air Force, *Working Group Recommendations Relating to Interrogation of Detainees*, ¶ 3 (Feb. 6, 2003), available at <http://www.torturingdemocracy.org/documents/20030205.pdf> (asking whether condemned practices are anathema to US fundamental values).

innocent.⁴⁸ Consider a simple inequality that draws on these assumptions: $B(P) > H + R(S)$.

The variables symbolize the following: B is the benefit by averting attacks; P is the probability that a terror plot exists, that a detainee bears pertinent information, and that the plot can be uncovered by using degrees of pressure; H is the harm to American society with violations of the Bill of Rights or international law standards; R is the individual right violations; and S is the severity of the interrogation method. The larger the B and P, the stronger the argument that harsh interrogation should be used, depending on the percentage of times that proven techniques dislodge probative revelations from the detainee's mind of verified planned attacks with potentially high cost. R(S) represents that methods may be increasingly brutal and be used even when B(P) is not high, particularly if detainees are versed in effective lying or will intentionally concoct fiction to avoid discomfort;⁴⁹ or are innocent and abused, but falsely admit guilt. The utility of torture diminishes to the extent that American Bill of Rights values or international laws are infringed. The B(P) variables are discussed in the remainder of this Part, and the $H + R(S)$ variables are addressed in Part III, which considers the development of the CIA's interrogation methods.

2. *The Highest Risk: The Ticking Time Bomb*

The Bush Administration's rationale for secretly detaining and questioning nearly 1,000 cell-lurking "evildoers" shortly after 9/11 was that terror plots might unfold inside U.S. borders, and confidentiality was required out of the belief that it would provide information to al-Qaeda and violate privacy of detainees.⁵⁰ On December 5, 2001, twenty-three human rights and civil rights groups filed a FOIA request to obtain information about detainees and by June 2002 received some information on detainees and their attorneys.⁵¹ Minimal information was released.⁵²

48. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 80 (2d ed. 1999) (U.N. Special Rapporteur for Torture noting that "once torture is permitted on grounds of necessity, nothing can stop it from being used on grounds of expediency.").

49. Maggie Farley, *U.S. Rejects Guantanamo Report*, L.A. TIMES, Feb. 17, 2006, <http://articles.latimes.com/2006/feb/17/world/fg-gitmo17> (White House Press Secretary Scott McClellan maintaining that "terrorists that are being kept at Guantanamo Bay . . . are trained to provide false information, and Al Qaeda training manuals talk about ways to disseminate false information").

50. Seth F. Kreimer, *Rays of Sunlight in a Shadow "War Crimes": FOIA, The Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1149-51 (2007).

51. *Id.* at 1150-51.

By August 2002, only 74 of the 751 detainees remained in custody.⁵³ Secrecy endured based on national security. On June 17, 2003, the D.C. Circuit reversed the lower court's order, and upheld the government's "refusal to disclose the identities of detainees" citing concerns about "interfere[nce] with enforcement proceedings."⁵⁴

Three years after 9/11, over 5,000 foreign nationals were "detained without access to counsel, only three of whom have ever eventually been charged with terrorism-related acts; two of those three have been acquitted."⁵⁵ American law enforcement was zealous in arresting individuals through 2003, and there were some allegations of abusive conditions in detention centers in New York and New Jersey.⁵⁶ There were more uncertainties over the number of detainees outside the U.S. and to which interrogation methods they were subject.⁵⁷ Detainees subject to harsh interrogation were in foreign locations, such as Iraq, Afghanistan, and Guantánamo Bay and at least 100 detainees died and hundreds more were physically and psychologically brutalized while being held in U.S. incarceration facilities.⁵⁸ Those detainees could not have posed a direct threat to U.S. citizens nor could they have been involved in an imminent terror plot inside the U.S.

Despite the improbability of attaining information to defuse an alleged immediate peril among different types of detainees and across

54. *Id.*

53. *Id.* at 1153.

54. *Id.* at 1159 (in June 2003, DC Circuit Judge Sentelle wrote in a 2-1 decision that identities could be withheld because publicizing detainee identities could "reasonably be expected to interfere with enforcement proceedings.").

55. Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE: A COLLECTION*, *supra* note 7, at 281-84.

56. Kreimer, *supra* note 50, at 1158-59 (stating through 2003, there were some allegations of abusive conditions in detention centers in New York and New Jersey).

57. *The Pledge*, *THE ECONOMIST*, July 3, 2003, at 47 ("American officials claim to have detained thousands of suspects, including some senior al-Qaeda leaders, but will not say where, and under what conditions, they are being held."); Don Van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, *N.Y. TIMES*, Mar. 9, 2003, at A14 (another reporter noting that "[E]ven the numbers and locations of suspected terrorists captured for interrogation are a mystery"); Press Release, Dir. of the Cent. Intelligence Agency, Gen. Michael V. Hayden, Director's Statement on Executive Order on Detentions, Interrogations, (June 20, 2007), available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/statement-on-executive-order.html> (CIA Director Hayden remarking about secret detention and interrogation: "In the past five years, fewer than 100 hardened terrorists have been placed in the program, and just a fraction of those—well under half—have ever required any sort of enhanced interrogation measures.").

58. Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, Torture*, 81 *IND. L.J.* 1255, 1257-58 (2005).

distinct jurisdictions, the unlikely “ticking time bomb” scenario was formulated and represented the imminent risk and elevated cost underlying Bush Administration directives to execute harsh interrogations.⁵⁹ In January 2002, Harvard Professor Alan Dershowitz opposed torture, but proposed that if the United States is going to conduct harsh interrogations, officials should “make the process legal and accountable.”⁶⁰ Dershowitz even contended that Congress should enact laws to permit judges to issue “torture warrants.”⁶¹ No “ticking time bombs” were ever discovered; but the Republican Party, during the 2008 presidential campaign, still conjured the threat of a “ticking time bomb” when a debate moderator posed a question to the Republican candidates in which terrorists successfully bombed three U.S. shopping malls with a catastrophic loss of human life.⁶² The debate moderator asked the candidates for their response to a hypothetical situation in which “[s]uspected terrorists, who have detailed knowledge of plans for imminent attacks,” and queried whether the candidates would authorize interrogations to attempt to attain information to locate the bomb hidden within a metropolitan area.⁶³

Critics disagreed with legalizing torture to defuse catastrophic ticking time bomb scenarios on moral and statistical probability grounds, and called the storyline unrealistic and a ploy to interject emotions and sabotage arguments of those who repel torture.⁶⁴ Legalizing torture, with exceptions, serves to “desensitize and acculturate the American people to

59. John Ip, *Two Narratives of Torture*, 7 NW. U.J. INT'L HUM. RTS. 35, 35, 46 (2009). Advocacy progressed as the Department of Homeland Security funded a project at Harvard to draft a code for coercive interrogation, but the bill was quashed in Congress by the advocacy of civil and human rights groups. ALFRED W. MCCOY, A QUESTION OF TORTURE 178-79 (2006).

60. Bagaric & Clarke, *supra* note 9, at 582 (Dershowitz explaining that it would be better to not use “torture at all, but if the United States is going to continue to torture people, we need to make the process legal and accountable.”).

61. DERSHOWITZ, *supra* note 34, at 144, 156-63 (“[A] sterilized needle [could be] inserted under the fingernails to produce unbearable pain without any threat to health or life.”); Joseph L. Falvey, Jr. & Brian D. Eck, *Holding the High Ground: The Operational Calculus of Torture and Coercive Interrogation*, 32 CAMPBELL L. REV. 561, 568 (2010) (“If it is agreed that coercive interrogation is justified in certain circumstances, even narrow circumstances . . . [it] should be made legal, albeit subject to numerous legal protections”).

62. David A. Wallace, *Torture v. the Basic Principles of the U.S. Military*, 6 J. INT'L CRIM. JUST. 309-10 (2008).

63. *Id.*

64. Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231 (2006).

torture,”⁶⁵ and “normalize torture as an interrogation tool,” while attempting to attain information that may be akin to “searching for a needle in a haystack.”⁶⁶ Advocates claiming that torture can be successful in gaining information to thwart an imminent plot are making an argument based on weak evidence. Professor Jeremy Waldron deemed accepting the “farfetched” ticking time bomb scenario “at best silly and at worst deeply corrupt.”⁶⁷ Professor Jamie Mayerfeld wrote that the time bomb fantasy “scenario bears almost no conceivable connection to the world we inhabit.”⁶⁸ It is almost impossible to have a situation where the U.S. government responds to a ticking time bomb where the government has reliable knowledge confirming the detainee’s guilt. Professor Luban wrote that “the ticking-bomb scenario is an intellectual fraud.”⁶⁹ Professor David Wallace remarked that scenarios concocted to justify a “torture warrant” system “are not even remotely realistic . . . When has such a scenario ever happened (other than on television)?”⁷⁰

The commonality of the television experience may make the legal argument seem more plausible. Ticking time bombs were frequently found on Fox’s television program, 24, in which “Bauer and his fellow agents at the fictional Counterterrorist Unit” had twenty-four hours to save the nation from a terror threat.⁷¹ When the heroes needed a fact

65. Elizabeth M. Iglesias, *Article II: The Uses and Abuses of Executive Power*, 62 U. MIAMI L. REV. 181, 187 (2008).

66. IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 182 (2005) (Jeremy Brecher, et al., eds. 2005); MCCOY, *supra* note 59, at 112, 192-94.

67. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1715, 1738 (2005); Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism,”* 1 J. NAT’L SECURITY L. & POL’Y 285, 294, 306-07, 319-20 (2005) (noting that the ticking time bomb scenario “may be hypothetically possible, but it will likely never exist;” that it likely that a tortured suspect will not have information, or that a detainee could have knowledge but remain silent); Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479, 486-90 (2006) (advocates claiming that torture can be successful in gaining information to thwart a plot are making an argument based on weak evidence).

68. Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 113 (2007); Scarry, *supra* note 55, in TORTURE: A COLLECTION, *supra* note 7, at 281-84 (having a ticking time bomb and certain knowledge about the detainee’s guilt is almost impossible).

69. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452 (2005).

70. Wallace, *supra* note 62; *Ex-CIA Analyst Accuses Tenet of Hypocrisy For Not Speaking Out Earlier on White House Push For War*, DEMOCRACY NOW! (May 1, 2007), http://www.democracynow.org/2007/5/1/ex_cia_analyst_accuses_tenet_of (former CIA analyst Ray McGovern explaining that “[t]his ticking time bomb in Times Square, it’s a red herring, [it] never happens.”).

71. *Id.*, *supra* note 59, at 35, 47.

urgently, they collectedly and effectively tortured a detainee, occasionally with drugs or electroshock, defused the ticking time bomb, and saved the world from “imminent thermonuclear annihilation.”⁷² Similarly, in the Sci-Fi Channel’s *Battlestar Galactica*, the Cylons (robots with an iconic oscillating red eye), and humans take turns torturing each other in order to gain valuable intelligence during the Cylons quest to eradicate colonies.⁷³ In Bruce Willis’s *Die Hard With a Vengeance* (1995), the police combed an elementary school to find a ticking time bomb attached to a giant vat of chocolate syrup, but no one needed to be tortured to discover the location.

If there is sufficient knowledge that a detained individual is a terrorist privy to a major and imminent terrorist act, then perhaps authorities should already possess adequate information to know the plot and location.⁷⁴ With all the abusive interrogations committed on detainees outside U.S. borders, there were no ticking time bombs, no terror attacks, and no credible leads to imminent plots.⁷⁵ Imagination and commonly portrayed fiction could induce interrogators to overuse⁷⁶ and speculate that a fresh detainee possesses insight regarding a ticking time bomb. Or, perhaps harsh interrogations cause detainees to invent convoluted plot scenarios to stop torture. Perhaps that was some of the intelligence that Bush Administration officials accepted as credible and led to claims of plots being foiled.

C. Skeptical Commentators

1. A Propensity to Exaggerate

The Bush Administration was prone to deliver extravagant rhetoric. For example, the Bush White House systematically issued threat warnings and altered the traffic-light terror alert system to apprise the public of peril, but there was never an attack and rarely anyone arrested in conjunction with threat warnings.⁷⁷ Of supposed plots, President Bush

72. M. Angela Buenaventura, *Presidential Power: Article and Poetry: Torture in the Living Room*, 6 SEATTLE J. SOC. JUST. 103, 117, 121-22 (2007).

73. *Id.*, *supra* note 59, at 36, 70, 72.

74. Luban, *supra* note 69, at 1442 (noting that the “ticking-bomb scenario cheats its way around these difficulties by stipulating that the bomb is there, ticking away, and that officials know it and know they have the man who planned it.”).

75. *Id.*

76. *Id.* at 1443-44.

77. Robert Bejesky, *A Rational Choice Reflection on the Balance Among Individual Rights, Collective Security, and Threat Portrayals Between 9/11 and the Invasion of Iraq*, 18 BARRY L. REV. (forthcoming 2012) (manuscript at 8).

referenced successes: “We’ve thwarted terrorists in Buffalo, and Seattle, Portland, Detroit, North Carolina, and Tampa, Florida.”⁷⁸ Professor David Cole disagreed:

[The Bush Administration] calls them “terrorist sleeper cell[s].” [T]hey call the Lackawanna people a terrorist sleeper cell, the Detroit people a terrorist cell, the Portland people a terrorist cell. But when you look at the details, the facts just don’t support that, and they have not proved that any group within the United States has plotted to engage in any terrorist . . . activity within the United States in all of the cases that they’ve brought since 9/11.⁷⁹

With regard to law enforcement processes, in July 2008, Milt Bearden, a thirty-year CIA official, wrote:

The administration’s claims of having ‘saved thousands of Americans’ can be dismissed out of hand because credible evidence has never been offered – not even an authoritative leak of any major terrorist operation interdicted based on information gathered from these interrogations in the past seven years. All the public gets is repeated references to Jose Padilla, the Lakawanna Six, the Liberty Seven and the Library Tower operation in Los Angeles. If those slapstick episodes are the true character of the threat, then maybe we’ll be ok after all.⁸⁰

In the case of Iraq, intelligence did not substantiate the Administration’s weapons of mass destruction allegations, and top officials apparently did nothing to apprise themselves of the spurious nature of the data that they kept secret inside the national security apparatus.⁸¹ With regard to alleged Iraqi links to al-Qaeda, one commentator remarked: “A mountain of evidence on the effectiveness of torture indicates why this supposed evidence of a relationship between

78. *The Power of Nightmares, Part 3: Shadows in the Cave* (BBC 2 television broadcast Nov. 3, 2004), (transcript available at <http://www.informationclearinghouse.info/video1040.htm>).

79. *Id.*; Ian S. Lustick, *Fractured Fairy Tale: The War on Terror and the Emperor’s New Clothes*, 16 MINN. J. INT’L L. 335, 338-39 (2007); David Cole & Jules Lobel, *Are We Safer?: A report card on the war on terror*, L.A. TIMES, Nov. 18, 2007, at M4.

80. Milt Bearden, *Truth & Consequences for CIA on Torture*, WASH. INDEP., (July 1, 2008), <http://www.washingtonindependent.com/743/truth-consequences-for-cia-on-torture>.

81. Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 875-82 (2011).

Iraq and al Qaeda proved inaccurate—torture victims tell interrogators what they want to hear.”⁸² Former captives publicly emerged and detailed how they provided false and incriminatory statements to stop torture.⁸³

2. Eliciting Falsities

While the Bush Administration insisted that approved interrogation methods were successful in uncovering plots, commentators have mostly rebutted those contentions and maintained that harsh interrogation is ineffective.⁸⁴ Some experts have commented that methods other than torture, such as building trust, are much more effective than torture.⁸⁵ Scientific studies evince that professional interrogators are accurate in distinguishing truth from lies between forty-five and sixty percent of the time,⁸⁶ which is about as reliable as flipping a coin.⁸⁷ However, polygraph examiners have an eighty-five to ninety percent accuracy rate, which is well above that of the accuracy rates for interrogators.⁸⁸ In any interrogation scenario, there is a degree to which the subject may be tricked into inculpatory responses, but that does not mean that the captive

82. Scheppele, *supra* note 67, at 336 (citing Ken Gude, *They Got What They Wanted: The Folly of the Bush Administration's Torture Policy*, CENTER FOR AM. PROGRESS (Aug. 5, 2004) available at <http://www.americanprogress.org/issues/security/news/2004/08/05/971/they-got-what-they-wanted/>); Gibbons, *supra* note 14, at 300 (“Surely, whatever interrogation techniques the CIA used with respect to pre-war Iraq activities were not effective.”).

83. IN THE NAME OF DEMOCRACY, *supra* note 66, at 70-73; (citing Shafiq Rasul & Asif Iqbal, *Letters to Members of the Senate Armed Services Committee*, May 13, 2004); Severin Carrell, et. al., *My Nightmare of Torture and Assault*, by Briton Held in Guantanamo, INDEPENDENT (Jan. 30, 2005), <http://www.independent.co.uk/news/uk/crime/my-nightmare-of-torture-and-assault-by-briton-held-in-guantanamo-6153644.html>; Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, NEW YORKER, Feb. 14 & 21, 2005, at 112, 116 (positing victims will confess to crimes and lie to stop the torture.).

84. Peter Johnston, Note & Comment, *Leaving the Invisible Universe: Why All Victims of Extraordinary Rendition Need a Cause of Action Against the United States*, 16 J.L. & POL'Y 357, 373 (2007).

85. *Id.* at 372-74.

86. MCCOY, *supra* note 59, at 194-95; GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY* 183-85 (1996).

87. Jonathan H. Marks, *Interrogational Neuroimaging in Counterterrorism: A “No-Brainer” or a Human Rights Hazard?*, 33 AM. J. L. & MED. 483, 485 (2007) (explaining that without the polygraph test, “most people—including professional interrogators—are unable to detect lies from demeanor when they rely solely on their own senses and intuition. In controlled studies, accuracy generally appears close to chance.”).

88. MCCOY, *supra* note 59, at 194-95; GUDJONSSON, *supra* note 86, at 183-85; Bagaric & Clarke, *supra* note 9, at 612-13.

is being physically or psychologically abused under uncomfortable or humiliating conditions. In an exceptional assessment of prime flaws in the reasoning by those who believe torture can be effective, Professor Jeannine Bell summarized:

The first assumption is that torture is only used against individuals whom the government has clearly established have strong ties to terrorism . . . The second assumption is . . . the myth . . . that the information possessed by those who are being tortured is valuable. . . [T]he third assumption underlying the myth is that physical pressure is highly effective; if you torture the terrorists, they will give up the goods.⁸⁹

In March 2008, Senate Intelligence Chairman John Rockefeller explained that he had heard nothing to suggest that the CIA, through enhanced interrogation methods, had obtained information to thwart a terrorist attack, but he was aware “that coercive interrogations can lead detainees to provide false information in order to make the interrogation stop.”⁹⁰ Seymour Hersh, a journalist-investigator of interrogation abuses, wrote that “[t]he interrogations at Guantanamo were a bust.”⁹¹ Very little useful intelligence had been gathered, while prisoners from around the world continued to flow into the base and the facility constantly expanded.⁹² In an amicus brief in *Boumediene*, the Bar of the City of New York highlighted that very few detainees had access to any valuable information for their trial.⁹³ John Brennan, former Chief of Staff to CIA Director George Tenet, specified that much of the information divulged from torture is unreliable.⁹⁴ Senator John McCain and former CIA analyst Ray McGovern have similarly expressed that they do not agree with George Tenet’s premise that lives were saved by using torture.⁹⁵ McCain explained: “History [shows] . . . that mistreatment of prisoners and torture is not productive . . . [T]hey just tell you what you want to

89. Bell, *supra* note 11, at 340.

90. Deb Riechmann, *Democrats Criticize Bush's CIA-Bill Veto*, USA TODAY, Mar. 8, 2008, http://www.usatoday.com/news/topstories/2008-03-07-1571861552_x.htm.

91. HERSH, *supra* note 2, at 2.

92. *Id.*

93. Brief for the Ass’n of the Bar of the City of New York as Amicus Curiae in Support of Petitioners, at 3-4, *Boumediene v. Bush*, 553 U.S. 727 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2414901, at *17-19.

94. Bell, *supra* note 11, at 355.

95. DEMOCRACY NOW!, *supra* note 70.

hear.”⁹⁶ Ray McGovern stated: “Torture doesn’t work . . . Experienced Intelligence officers know that . . . [T]orture is intrinsically evil. It’s in the same category as rape or slavery: always wrong.”⁹⁷ The FBI calls torture an ineffective technique.⁹⁸ The U.S. Army Field Manual condoned methods to confuse, manipulate, and strike fear into the detainee; the manual clearly states that forceful interrogations “yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.”⁹⁹

Interrogation may produce involuntary statements irrespective of whether the interrogation rises to the level of torture or is cruel, inhuman and degrading treatment or punishment.¹⁰⁰ Detainees may offer false confessions, impart narratives of real or fictional characters who are supposedly terrorists, invent fake plots, and offer illusions.¹⁰¹ Army General James T. Hill wrote a memo specifying that more intense interrogation methods were required because detainees were resisting current methods, but the memo did not cite evidence to substantiate that more coercive interrogation would yield better intelligence.¹⁰² Classic

96. Sheryl Gay Stolberg, *Prisoner Abuse Scandal Puts McCain in Spotlight Once Again*, N.Y. TIMES, May 10, 2004, at A19; Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 37 CASE W. RES. J. INT’L L. 541, 589 (2005) (“As the interrogation methods increase in intensity, the likelihood that the information will be deemed coerced and involuntary . . . increases”); DEP’T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS 56-57 (2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>; Bell, *supra* note 11, at 355 (explaining John Conroy’s account of the North Vietnamese concocting stories under torture about ambushes that would never come).

97. DEMOCRACY NOW!, *supra* note 70.

98. *Oversight of the Federal Bureau of Investigation: Hearing of the Senate Judiciary Committee*, 109th Cong. (July 27, 2005) (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary).

99. DEP’T OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 1-8, 3-16 to 3-20 (1992), available at <http://www.fas.org/irp/doddir/army/fm34-52.pdf#search=%22FM%2034-52%20Field%20Manual%22> (manual also condoning manipulation to confuse the detainee and methods to strike fear in the detainee).

100. Wallach, *supra* note 96, at 589.

101. Ip, *supra* note 59, at 56 (“There are clear instances of torture or coercion producing unreliable evidence”); Brian J. Foley, *Criminal Law: Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009, 1046 (2007); Scheppele, *supra* note 67, at 294 (“torture produces results that are highly unreliable”).

102. Bell, *supra* note 11, at 350.

torture inflicts pain.¹⁰³ While different people have varying thresholds for emotional and physical pain, some people will admit to anything rather than suffer that pain.¹⁰⁴

Professor Mary Ellen O'Connell enumerated: "[T]he weight of the evidence is firmly against the conclusion that forceful interrogation is as reliable as non-forceful methods. In fact, the evidence on information-gathering supports international law's absolute prohibition on torture, cruelty, and coercion."¹⁰⁵ Douglas Johnson, the executive director for the Center for Victims of Torture explained that "[t]orture does not yield reliable information" and would be overused, including on the innocent.¹⁰⁶ Professor John Gibbons explained that he was unaware of any psychological study that intimated torture victims will normally tell the truth, but instead "many of the abusive interrogation techniques used by the CIA and the military have been found to impair the ability to recall and produce accurate information."¹⁰⁷ Former CIA officer Robert Baer noted: "You can get anyone to confess to anything if the torture's bad enough."¹⁰⁸

Professor Harold Koh wrote: "To be sure, there is abundant evidence that torture is not effective either as an interrogation tactic or as an information-extracting device."¹⁰⁹ Professor David Wallace also believes that "it is highly speculative to conclude that torture works at all."¹¹⁰ Joseph Anzalone construed: "Torturing an individual certainly compels that person to act beyond his or her will . . . The act of torture is known to force individual to provide information that the torturer wants to hear,

103. *Id.* at 343-44; Luban, *supra* note 69, at 1431-32 ("[T]orture terrorizes. The body in pain winces; it trembles . . . [a]nd torture humiliates. It makes the victim scream and beg."); HERSH, *supra* note 2, at 66 (Thirty-six year Army intelligence official Willie Rowell remarking that "[t]hey'll tell you what you want to hear, truth or no truth . . . You can flog me until I tell you what I know you want me to say. You don't get righteous information.").

104. MCCOY, *supra* note 59, at 16.

105. O'Connell, *supra* note 3, at 1234.

106. *Confirmation Hearing on the Nomination of Alberto Gonzales to Be Attorney General of the United States: Hearing of the S. Judiciary Comm.*, 109th Cong. (2005) (statement of Douglas A. Johnson, Executive Director, The Center for Victims of Torture).

107. Gibbons, *supra* note 14, at 300.

108. Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, (Nov. 18, 2005), <http://abcnews.go.com/Blotter/Investigation/story?id=1322866&singlePage=true>.

109. Koh, *supra* note 30, at 653.

110. Wallace, *supra* note 62.

regardless of whether that information is true.”¹¹¹ Professor David Weissbrodt and co-author Andrea Templeton stated: “Information obtained by either torture or ill-treatment is unreliable since a witness will say whatever he or she believes may stop the infliction of pain—rather than telling the truth.”¹¹² Professor Brian Foley explained:

Most people who are ‘water-boarded,’ beaten, deprived of sleep, and attacked by guard dogs – or who are simply threatened with such treatment – will, at some point, decide that it is in their interest to acquiesce to their captors, such as by telling them what they know, agreeing with the accusations interrogators make against them, or even concocting stories that they believe will please their interrogators.¹¹³

Courts agree. In *Stein v. New York*, the Supreme Court held that courts prohibit “any confession made concurrently with torture or threat of brutality” because there is a “tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong.”¹¹⁴ In *Malinski v. New York*, the Court held that a suspect’s statement was involuntary when he was kept naked and questioned.¹¹⁵

To justify the utility of harsh interrogation, Professor Alan Dershowitz referenced Abdul Hakim Murad who was reportedly tortured in the Philippines for sixty-seven days and allegedly revealed al-Qaeda plots.¹¹⁶ Torturing someone for sixty-seven days to obtain critical information is not a ticking time bomb scenario. Also, investigators did not know if Murad divulged accurate accounts to Filipino authorities or invented stories, and there were contradictory versions of whether he was tortured.¹¹⁷ One should ponder the precedent from the Korean War in which thirty-six U.S. military soldiers were placed in stress positions, subjected to psychological torture, and confessed to a range of false

111. Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. DAVIS J. INT’L L. & POL’Y 273, 298 (2010).

112. David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. J. 353, 383-84 (2008).

113. Foley, *supra* note 101, at 1044-45.

114. *Stein v. New York*, 346 U.S. 156, 182 (1953).

115. *Malinski v. New York*, 324 U.S. 401, 417-19 (1945).

116. O’Connell, *supra* note 3, at 1258; Luban, *supra* note 69, at 1441-42.

117. O’Connell, *supra* note 3, at 1258-59.

charges.¹¹⁸ During the Vietnam War, the Chinese used methods, such as hooding, placing soldiers in stress positions, invoking fear, and using sensory deprivation to extract false confessions.¹¹⁹

D. Concluding Points

In assessing the B(P) variables and whether there is a high probability that harshly interrogating someone will result in obtaining information to thwart an attack, one cannot simply allege that terrorist attacks would have occurred “but for” interrogations without providing evidence.¹²⁰ Yet that is precisely what happened. National security secrecy shrouded detail, and for years Americans were obliged to accept all of the Bush Administration’s fishy warnings about imminent terrorist attacks that never manifested.¹²¹ Interrogations seemed to lead to embellished news accounts, but without access to detail, no one was able to discredit unsubstantiated reports before accounts were publicly disseminated.¹²² The remainder of the Article details CIA research on interrogation to relay how methods developed and were historically employed to glean insight into whether approaches recently used in CIA and Pentagon incarceration facilities could reasonably be expected to be effective.

III. THE HISTORY OF CIA METHODS

A. Legality and Effectiveness of Present-Day Methods

In his book that scrutinizes the historical development and use of the CIA’s psychological interrogation tactics, Professor Alfred McCoy explains that “CIA torture methods . . . have metastasized like an undetected cancer inside the U.S. intelligence community over the past half century . . . [The Abu Ghraib] photographs from Iraq illustrate standard interrogation practice.”¹²³ The methods were itemized in the CIA’s *Kubark Counterintelligence Interrogation* (1963) and the

118. Joseph Marguiles, *Torture Not Appropriate Then, or Now*, TIMES UNION, Oct. 4, 2006, at A9, available at <http://www.albarchive.merlinone.net/mweb/wmsql.wm.request?one.image&imageid=6361555>.

119. Scharf, *supra* note 16, at 399-400.

120. Bejesky, *supra* note 81, at 863-66.

121. *Id.*

122. Bejesky, *supra* note 77, at 11-16 (noting ten major post-9/11 warnings has minimal evidentiary bases); Bejesky, *supra* note 81, at 863-66.

123. MCCOY, *supra* note 59, at 5.

Honduran *Human Resources Exploitation Training Manual* (1983),¹²⁴ and did not substantially change during the twenty years between the two publication dates.¹²⁵ Nevertheless, when congressional investigations uncovered the manuals, editors modified pages, and avowed that “coercion and stress techniques” were “prohibited by law” and were “neither authorized nor condoned.”¹²⁶ The approaches are staggeringly parallel to methods that U.S. interrogators administered on detainees held in Afghanistan, Guantanamo Bay, and Iraq.¹²⁷

The psychological interrogation methods did not extemporaneously materialize and should have reasonably been contemplated to produce generalized patterns of abuse. A few miscreant interrogators or “bad apples” did not perpetrate isolated incidents of reproach. Moreover, legal advisers sanctioned misconduct and methods and provided sanctuary from criminal liability.¹²⁸ The CIA purportedly required guidance on the methods under international law, and requisitioned a public pledge from the Bush Administration to ensure that international and legal restrictions either did not appertain to agents or that methods did not violate law,¹²⁹ but the international community and the European Court of Human Rights condemned the same techniques.¹³⁰ While the query does indicate an attempt to match legal restrictions with methods that would be most effective to obtain information from detainees, if the methods are not legal, the Bush White House lacked authority to promise immunity, particularly if violations rose to the level of *jus cogen* norms.¹³¹

Consider the methods broadly on a continuum of producing valuable intelligence at one extreme, which was the Bush Administration’s contention, and yielding falsities at the other extreme, which is the position of critics. From the useful pole, Dr. William Sergeant, the former

124. *Id.* at 12, 50-53, 88-89; Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 35 (2008).

125. MCCOY, *supra* note 59, at 50, 92-94; Clarke, *supra* note 124, at 33-34.

126. Clarke, *supra* note 124, at 35.

127. George R. Fay, 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE 10 (2004) *available at* <http://purl.library.voregon.edu/e-asia/ebooks/reada/abugrab.pdf> (“[T]he use of nudity as an interrogation technique which was imported and can be traced back through Afghanistan.”); Clarke, *supra* note 124, at 37; Stephen P. Marks, *Branding the “War on Terrorism”: Is There a “New Paradigm” of International Law?*, 14 MICH. ST. J. INT’L L. 71, 109-10 (2005).

128. ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 24-25 (2006).

129. MCCOY, *supra* note 59, at 115, 143 (citing Jay S. Bybee’s memo and Senator Edward Kennedy explaining that the CIA actively sought the memo “to protect their agents from being prosecuted.”).

130. *See infra* Part V.C.

131. Bejesky, *supra* note 29 at 42, 65.

head psychiatrist for British intelligence, clarified the ambition behind the psychological interrogation methods, which was to “create feelings of anxiety and guilt and induce states of mental conflict” to impair judgment and disturb “the normal functioning of his brain” and elicit confessions.¹³² At the other extreme of methods producing falsities, interrogation techniques and the psychological processes were analogous to many of the research findings that the CIA officially labeled “brainwashing,” which is a forcible or non-forcible, “deliberate and manipulative changing of belief.”¹³³ Testifying to the Senate in 1977, CIA psychologist John Gittinger stated that “brain-washing was largely a process of isolating a human being, keeping him out of contact, putting him under long stress in relationship to interviewing and interrogation.”¹³⁴ Even the CIA acknowledged that the interrogation process can produce “compliant behavior” such that the victim divulges what the interrogator wants to hear, rather than accurate information.¹³⁵ In practical terms of interaction, studies of interrogation indicate that the “presumption of guilt underlies interrogation,” initiating a “process of behavioral confirmation which shapes the interrogator’s, as well as the suspect’s behavior.”¹³⁶ If there is a presumption of guilt, an interrogator attempts to induce a confession, and methods so impair the detainee’s judgment, then coercion might be the result. Analyzing the milieu of CIA interrogation manual in his book, Professor Douglas Rushkoff wrote:

[W]hen a person is interrogated and the hours and days pass] sights and sounds of an outside world fade away, [and] its significance is replaced by the interrogation room, its two occupants, and the dynamic relationship between them. The subject becomes completely dependent on the interrogator for all external stimuli and, accordingly, his sense of self. . . They are all designed to disrupt a person’s familiar associations and lead him into a state of confusion. When this aim is achieved, resistance is seriously impaired. . . [A] kind of psychological shock or paralysis. . . explodes the world that is familiar to the subject as well as his image of himself within that world.

132. DENISE WINN, *THE MANIPULATED MIND: BRAINWASHING, CONDITIONING AND INDOCTRINATION* 179 (2d ed. 2000).

133. TAYLOR, *supra* note 1, at 52.

134. MCCOY, *supra* note 59, at 49-50.

135. *Id.* at 42 (citing LAWRENCE E. HINKLE JR., *A CONSIDERATION OF THE CIRCUMSTANCES UNDER WHICH MEN MAY BE INTERROGATED, AND THE EFFECTS THAT THESE MAY HAVE UPON THE FUNCTION OF THE BRAIN* 1, 5, 6, 11-14, 18, (1958) in *CIA BEHAVIOR CONTROL EXPERIMENTS COLLECTION*).

136. Bell, *supra* note 11, at 359.

Experienced interrogators recognize this effect when it appears and know that at this moment the source is far more open to suggestion.¹³⁷

The remainder of this Part details the techniques as they developed during the Cold War. CIA research was purportedly conducted to counter suspected Soviet developments in the field.

B. A Three-Step Approach

1. The Research Agenda

Professor Darius Rejali explained that “the real innovators in 20th century torture. Britain, France, and the United States perfected new forms of torture . . . It might make Americans uncomfortable, but the modern repertoire of torture is mainly a democratic innovation.”¹³⁸ The British Minister of Defense, Sir Henry T. Tizard; the Chairman of the Canadian Defense Research Board, Dr. Omond M. Solandt; CIA scientist Dr. Caryle P. Haskins, and other select scientists met on June 1, 1951 in Montreal and agreed to embark on an American, British, and Canadian intelligence agency alliance to study behavioral science and cultivate effective methods of psychological interrogation as a weapon during the Cold War.¹³⁹ The CIA was ostensibly the most avid user of psychological interrogation as a weapon, and developed an interrogation methodology predominately by combining three research findings of esteemed scientists on the discombobulating emotional and cognitive impact that sensory deprivation could have on individuals, the effectiveness of self-inflicted pain during interrogation, and the conditions under which otherwise normal individuals were capable of torturing others because of obedience to authority.¹⁴⁰

137. DOUGLAS RUSHKOFF, COERCION: WHY WE LISTEN TO WHAT “THEY” SAY 39-41 (1999).

138. Darius Rejali, *Torture, American Style – The Surprising Force Behind Torture: Democracies*, BOSTON GLOBE, Dec. 16, 2007, at D1.

139. MCCOY, *supra* note 59, at 33-35 (citing CIA Minutes of Meeting, June 6, 1951, Artichoke Docs. 59-155; CIA, Memorandum For: Assistant Director, SI, Progress on BLUEBIRD, July 9, 1951, Artichoke Docs. 59-155); Bart Barnes, *CIA Official Sidney Gottlieb, 80, Dies Directed Tests With LSD in ‘50s, ‘60s*, WASH. POST, Mar. 11, 1999 (lack of drug knowledge “posed a threat of the magnitude of national survival”).

140. MICHAEL OTTERMAN, AMERICAN TORTURE: FROM THE COLD WAR IN ABU GHRAIB AND BEYOND 42-44 (2007) (discussing the prolonged harm from the sensory deprivation); PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 266-74 (2007); MCCOY, *supra* note 59, at 32-33, 35, 44-45; Martha Minow, *Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the*

2. Sensory Isolation

a. The Origin of the Research

U.S. intelligence and the Canadian Defense Research Board funded Dr. Donald O. Hebb's sensory deprivation research at McGill University from 1951 to 1954.¹⁴¹ Hebb found that "changing sensory environment seems essential for human beings," and that radical isolation for even short-term deprivation could devastate intellectual function and the human psyche.¹⁴² Minimal conditions of perceptual isolation rapidly broke down mental processes, problem-solving, ability, and IQ-test performance; while four hours of isolation made subjects incapable of following "a connected train of thought."¹⁴³

Hebb discovered that isolating subjects in a "black box" with translucent goggles, a constant low noise, thick gloves, and boots (to eliminate the sense of touch) caused hallucinations within between twenty minutes and several hours; paranoia, panic, emotional distress, inability to distinguish between states of sleep and being awake, and feelings of insanity after several hours; and eventually to a temporary loss of identity after two or three days.¹⁴⁴ Sensory deprivation led individuals to be exceptionally susceptible and to having new beliefs implanted because isolation and stress could breakdown organized brain activity.¹⁴⁵

British intelligence replicated sensory-deprivation experiments, and documented even more profound emotional disturbances and hallucinations than Hebb recorded.¹⁴⁶ In 1955, Dr. Morse Allan directed

Superior Orders Defense, 52 MCGILL L.J. 1, 30-31 (2007); Clarke, *supra* note 124, at 13-14, 30-31.

141. DOMINIC STREATFEILD, *BRAINWASH: THE SECRET HISTORY OF MIND CONTROL* 109 (2007) (citing CIA, DRBS 2-1-44-38 (CD(D)), Dec. 15, 1952; CIA, DRBS 2-1-44-38 (CD(D)), Jan. 1, 1953, CIA, DRBS 2-1-44-38 (CD(D)), Nov. 16, 1953, Jan. 11, 1954, PA/CDRB, Jan. 25, 1954; CIA, TV 472907, July 6, 1954) (noting that Hebb was being sponsored and directed by United States and Canadian intelligence, but this remained classified until decades later).

142. STREATFEILD, *supra* note 141, at 109; Clarke, *supra* note 124, at 31.

143. MCCOY, *supra* note 59, at 36 (citing W.H. Bexton, W. Heron & T.H. Scott, *Effects of Decreased Variation in the Sensory Environment*, 8 CAN. J. OF PSY. 70-76 (1954); D.O. Hebb, *Drives and the C.N.S. (Conceptual Nervous System)*, 62 PSY. REV. 243-54 (1955); W. Heron, W.H. Bexton & D.O. Hebb, *Cognitive Effects of a Decreased Variation in the Sensory Environment*, 8 AMER. PSYCH. 366 (1953)).

144. STREATFEILD, *supra* note 141, at 111-12; MCCOY, *supra* note 59, at 35.

145. STREATFEILD, *supra* note 141, at 111; MCCOY, *supra* note 59, at 41.

146. STREATFEILD, *supra* note 141, at 119-20; MCCOY, *supra* note 59, at 53-54; S. Smith & W. Lewty, *Perceptual Isolation in a Silent Room*, 2 LANCET 342-45 (1959).

the CIA's Office of Security to explore how sensory isolation techniques could "break any man, no matter how intelligent or strong-willed."¹⁴⁷ Allan specifically wanted to test how "deeply coercive deprivation could disturb the mind," and he encouraged other scientists to study how completely removing outside distractions could be used on involuntary subjects to breakdown and alter belief systems of the subjects.¹⁴⁸ The Pentagon and CIA funded additional sensory deprivation projects in U.S. universities.¹⁴⁹

Psychiatrists at Harvard University conducted water immersion sensory deprivation studies and concluded that subjects experienced deep states of "panic," "hallucinations," and "anxiety," that "sensory deprivation could produce major mental and behavioral changes in man," that "brainwashing" might result, and that naturally-induced psychosis was more potent than pharmacological drugs and physical torture.¹⁵⁰ Jack A. Vernon, a psychologist at Princeton, stated: "We may conclude that the effects of Sensory Deprivation are similar to those of brainwashing . . . [C]onfinement rendered people more susceptible to propaganda and led to greater attitude change."¹⁵¹ Further CIA experimentation confirmed that sensory deprivation could be accompanied by playing propaganda tapes to dramatically change ideology on certain issues,¹⁵² and that sleep

147. Allan, who was the head of the CIA's Artichoke project, noted that six days of sensory deprivation would "almost certainly cause irreparable damage." MCCOY, *supra* note 59, at 38-39 (citing CIA, Memorandum for the Record, SUBJECT: Project ARTICHOKE, Jan. 31, 1975; JOHN MARKS, THE SEARCH FOR THE MANCHURIAN CANDIDATE, 23-25, 32-33, 106, 137-38, 201-02 (1979)).

148. STREATFEILD, *supra* note 141, at 116-18 (noting that Dr. Maitland Baldwin at the National Institute of Mental Health and one of Hebb's postgraduate students conducted bizarre experiments for the agency); MCCOY, *supra* note 59, at 39 (referencing CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION 88-89 (1963), available at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB122/index.htm#kubark>; John C. Lilly, *Mental Effects of Reduction of Ordinary Levels of Physical Stimuli on Intact, Healthy Persons*, 5 PSYCH. RES. REP. 1-9 (1956)).

149. STREATFEILD, *supra* note 141, at 116; Clarke, *supra* note 124, at 31.

150. MCCOY, *supra* note 59, at 40 (citing KUBARK, *supra* note 148, at 89; Donald Wexler, Jack Mendelson, Herbert Leiderman & Philip Solomon, *Sensory Deprivation: A Technique for Studying Psychiatric Aspects of Stress*, 79 AMA ARCHIV. OF NEUR. & PSYCH. 79, 225-33 (1958)).

151. STREATFEILD, *supra* note 141, at 116; MCCOY, *supra* note 59, at 41 ("Although America has never used such a technique and presumably never will, there can be no doubt that we could build a very effective brainwashing technique."). Vernon reproduced and verified Hebb's results with one hundred Princeton University students and found that "physical violence" in interrogation "appears unwise" and counterproductive when psychological sensory deprivation can clearly "build a very effective brainwashing technique." *Id.*

152. STREATFEILD, *supra* note 141, at 115-16 (explaining that subjects who were previously ambivalent about the country of Turkey were played positive propaganda

deprivation made the brain especially “vulnerable.”¹⁵³ Standard police interrogation processes in the U.S. rely on isolating suspects,¹⁵⁴ but the CIA viewed sensory isolation as a decisive phase in breaking down a prisoner’s brain functions to permit “intense emotional and psychological manipulation” in the same way that occurs with being “beaten, starved, or deprived of sleep.”¹⁵⁵ The U.S. Supermax prison facilities have also come under scrutiny from social scientists, policy organizations, human rights organization, and the American Bar Association for the use of isolation.¹⁵⁶

b. Pushing Sensory Deprivation with Technology and Drugs

The CIA recruited Dr. Ewen Cameron, who had been President of the American Psychiatric Association (1952-53), Canadian Psychiatric Association, and Quebec Psychiatric Association, and would later be President of the World Psychiatric Association (1961).¹⁵⁷ CIA Director Allan Dulles personally approved Cameron’s program as MKUltra Subproject 68 on January 23, 1957, appointed CIA scientist Dr. Sidney Gottlieb to supervise Cameron’s program, and allocated an annual \$20,000 through New York’s Human Ecology organization from 1957 to 1964.¹⁵⁸ Cameron published papers disclosing that he created “extraordinary political conversions” in subjects, including by “using sleeplessness, . . . [drugs], and hypnosis.”¹⁵⁹ In the *American Journal of Psychiatry*, Cameron noted that he used Dr. Hebb’s isolation techniques and findings, and placed schizophrenic patients into a “clinical coma” with LSD, other drugs, and hypnosis as a medical treatment.¹⁶⁰ The approaches were more controversial than were reported in academic journals.

tapes and were eight times more positive toward Turkey than subjects not propagandized).

153. MCCOY, *supra* note 59, at 42 (citing Hinkle Jr., *supra* note 135).

154. GUDJONSSON, *supra* note 86, at 68.

155. MCCOY, *supra* note 59, at 33 (citing THE MANIPULATION OF HUMAN BEHAVIOR 29 (Albert D. Biderman & Herbert Zimmer, eds., 1961); KUBARK, *supra* note 148; TAYLOR, *supra* note 1, at 210).

156. Judith Resnick, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 639-41, 644-45 (2010).

157. *World Psychiatric Association Chronology*, WORLD PSYCHIATRIC ASS’N (Oct. 12, 2012), http://www.wpanet.org/detail.php?section_id=5&content_id=7.

158. MCCOY, *supra* note 59, at 43-44.

159. *Id.* at 42.

160. *Id.* at 43 (citing D. Ewen Cameron, *Psychic Driving*, 112 AMER. J. OF PSYCH. 502-09 (1956)).

Cameron contended that he sought to effectively treat patients with the worst mental conditions, but later court documents exposed that patients were admitted to the Allan Memorial Institute with moderate emotional problems or depression, but were committed as "schizophrenic" and involuntarily initiated into Cameron's "three-stage method for depatterning" to erase personalities.¹⁶¹ Depatterning included using electrical shock therapy (ECT).¹⁶² Some physicians have used ECT to reduce the emotional impact of traumatic experiences and psychological illnesses, and to repress phobias by giving one electric shock and waiting for days or weeks before administering another shock, but Cameron administered six sequential shocks every day over extended periods of time.¹⁶³ Repetitive shocks annihilated memories, and left some patients incapable of remembering "who they were, where they were, or why" and regressing to the maturity of pre-school children who would cry, suck their thumbs, and lose control over innate habits, such as bowel and bladder control.¹⁶⁴

After annihilating memories, the second step was to saturate and pattern the brain with fresh messages.¹⁶⁵ Cameron placed patients into drug-induced comas for up to eighty-six days, administered electroshock treatment for thirty days, and restrained patients by attaching a football helmet with speakers to patients' heads for up to twenty-one days for continuously repeated messages to repattern the brain.¹⁶⁶ Those who fought helmet restraints were forcibly given LSD, mescaline, sodium amytal, Largactil, psilocybin, curare (an African paralysis poison), and other combinations of drugs so they could not resist.¹⁶⁷

161. *Id.* at 44; Karin Goodwin, *Brainwash Victims Win Cash Claims*, SUNDAY TIMES, Oct. 17, 2004.

162. STREATFEILD, *supra* note 141, at 213 (Cameron wanted to "destroy pathological behavior patterns held in the memory storage systems" of his patients). Dr. James Birley, former president of the Royal College of Psychiatrists, remarked "that the brain's circuits that were fuelling the psychotic ideas, or the neurosis, or whatever it was, could be sort of turned off . . . All his forms of treatment . . . were related to this idea of 'breaking up the circuits' . . . and replacing them with more healthy views of themselves." *Id.* at 238.

163. STREATFEILD, *supra* note 141, at 213.

164. *Id.* at 213-14.

165. *Id.* at 217-18.

166. MCCOY, *supra* note 59, at 44; STREATFEILD, *supra* note 141, at 218-19 (noting that the approach became so pervasive that full wings of Allan Memorial Institute were teeming with patients being subjected to the three-stage approach, and that copper wires were put around a patient's legs to give a quick electric shock every time a message was repeated).

167. STREATFEILD, *supra* note 141, at 219-21 (Cameron favoring a deep chemical sleep that further immobilized patients).

One patient, known as “Mary C.,” explained that she experienced hallucinations when she was placed in a box for “36 days of total sensory deprivation.”¹⁶⁸ Others were placed in “sleep rooms” and subjected to many-month-long, drug-induced comas while being played “driving messages without interruption,” only to be woken up and given more ECT.¹⁶⁹ Janine Huard, who had been successfully treated at Allan three years earlier, explained that she fought against being given ECT shocks because she felt like she was being wheeled down to the electric chair to be killed every day.¹⁷⁰ Investigations revealed that she had been given LSD, various other drugs, and nitrous oxide by a gas mask that she could not remove, and that she continually resisted listening to the messages that were forcibly played in her ears.¹⁷¹ Linda McDonald was given over 100 ECT treatments and placed into a chemically-induced sleep for eighty-six days, and could not recognize her husband or children, or recall anything prior to her admission to Allan.¹⁷² Patients provided testimonials of waking up and trying to hide or escape, only to be restrained and put back into bed and sedated.¹⁷³

c. CIA Funding and the Lawsuits

Cameron’s “three-step depatternization” approach continued for several years while other physicians, anaesthetists, and nurses at the Allan Institute later remarked how it was “odd” and they “hated” doing it, but they thought it was “safe in a physical sense” and were restricted from disclosing the activities because of the patient-doctor relationship.¹⁷⁴ Patients were also in a weak position to later complain because they had been involuntarily committed, and likely had enormous difficulties in proving what happened due to compromised memories.¹⁷⁵ Apparently there was also a national security leverage that muffled participants.¹⁷⁶ Uniformed military officials occasionally visited Allan to lecture the staff about brainwashing, perhaps to emphasize the research benefits during the Cold War, and to understand brainwashing of POWs during the Korean War.¹⁷⁷

168. MCCOY, *supra* note 59, at 44.

169. STREATFEILD, *supra* note 141, at 220-21.

170. *Id.* at 212, 214.

171. *Id.* at 220.

172. *Id.* at 230.

173. *Id.* at 220-22.

174. *Id.* at 240.

175. STREATFEILD, *supra* note 141, at 240-41.

176. *Id.*

177. *Id.* at 231.

Dr. William Sargant, the top British intelligence researcher in these techniques and a co-founder (with Cameron) of the World Psychiatric Association in 1961, was also involved with Allan Institute and employed comparable depatterning techniques at Ward 5 of Royal Waterloo Hospital in Britain.¹⁷⁸ In 2007, a former nurse in Ward 5 described how she still felt traumatized from working in Ward 5: "They were trying to take over these people, and almost infiltrate them, change their personalities, change who they were."¹⁷⁹ The records from Ward 5 were destroyed.¹⁸⁰

After word spread of patients entering the Allan Institute with mild conditions and departing with amnesia, in 1963 the CIA terminated involvement with Cameron after seven years of funding.¹⁸¹ Cameron resigned as director of Allan Memorial in 1964, took all of the CIA MKUltra Subproject 68 records, left the country, and moved to New York.¹⁸² Three years later, the Allan Institute launched an investigation during which it interviewed and examined seventy-nine of Cameron's patients who were subjected to the full three stages of "depatterning."¹⁸³ The investigation team discovered that 60% of the patients still had permanent amnesia with no memory of their prior lives and 23% still had severe physical complications even though these were Cameron's patients three to ten years prior.¹⁸⁴ Some patients, who were successful members of society prior to entering Allan, were "near-vegetables," continually "guilt-ridden" and paranoid with no memory and no life.¹⁸⁵ Ironically, concomitant with the start of the Institute's formal investigation, Cameron died of a heart attack in September 1967 at the age of sixty-five while mountain climbing.¹⁸⁶ The chief physician was no longer available as a witness.

Decades of court battles ensued. Investigations uncovered that Cameron had conducted hundreds of LSD mind-control experiments on patients at the Allan Memorial Institute from 1950 to 1965.¹⁸⁷ In 1988,

178. *Id.* at 232, 238; see also WINN, *supra* note 132, at 28.

179. STREATFEILD, *supra* note 141, at 239.

180. *Id.* at 240.

181. MCCOY, *supra* note 59, at 44-45.

182. *Id.* at 45.

183. *Id.*

184. *Id.* (citing Linda MacDonald, *Breakthrough*, in *SHRINK RESISTANT: THE STRUGGLE AGAINST PSYCHIATRY IN CANADA* (Bonnie Burstow & Don Weitz, eds, 1988)).

185. David Remnick, *25 Years of Nightmares*, WASH. POST, July 28, 1985, at F2.

186. *Obituary Notice: Ewen Cameron*, 3 BR. MED. J. 803 (1967), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1843238/?page=1>.

187. Goodwin, *supra* note 161; see also *Woman Awarded \$100,000 for CIA-Funded Electroshock*, CBC NEWS (June 10, 2004), http://www.cbc.ca/news/canada/story/2004/06/10/shock_award040610.html

the U.S. government paid \$750,000 to nine Canadian plaintiffs because the "C.I.A. made them the subjects of mind-control experiments involving drugs."¹⁸⁸ By October 2004, only seventy-seven patients had received compensation, but a federal court judge in Montreal was extending compensation to 250 more patients.¹⁸⁹ Unfortunately there were still hundreds more who deserved compensation.¹⁹⁰

American civil rights lawyer Joseph Raugh pushed these cases forward against lawyers, the U.S. Justice Department, and the CIA to obtain classified documents hidden in fifty-year-old CIA records so that his clients could receive compensation as victims of the CIA's "barbaric . . . brainwashing" agenda that used U.S. taxpayer funding to prove their hypotheses.¹⁹¹ Although the U.S. Justice Department's mission statement is "to enforce the law . . . preventing and controlling crime . . . to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans," it *defended* these cases.¹⁹² The victims were Canadian and the acts occurred outside the U.S.

Similar to what Cameron administered on patients as a medical practice, the CIA's declassified documents on Project Artichoke verified successes in placing subjects in drug-induced hypnotic trances and producing a "subsequent total amnesia . . . by post-hypnotic suggestion."¹⁹³ Similarly, the CIA sponsored LSD research at U.S.

188. *U.S. to Pay \$750,000 In Suit on LSD Testing*, N.Y. TIMES, Oct. 12, 1988, <http://www.nytimes.com/1988/10/12/world/us-to-pay-750000-in-suit-on-lsd-testing.html>; see also Philip Shenon, *C.I.A. Near Settlement of Lawsuit By Subjects of Mind-Control Tests*, N.Y. TIMES, Oct. 6, 1988, <http://www.nytimes.com/1988/10/06/world/cia-near-settlement-of-lawsuit-by-subjects-of-mind-control-tests.html>.

189. Goodwin, *supra* note 161; see also CBC NEWS, *supra* note 187.

190. Goodwin, *supra* note 161; CBC NEWS, *supra* note 187. The 250 patients who were awarded compensation in October 2004 had previously been denied compensation ten years earlier because they had the burden of proving that they had been "totally depatterned." *Victim Owed Compensation in CIA Case, Judge Told*, GLOBE & MAIL, Jan. 11, 2007.

191. Goodwin, *supra* note 161; see also *Psychiatry Bears Guilt in Brainwashing Tests*, N.Y. TIMES, Nov. 26, 1988, <http://www.nytimes.com/1988/11/26/opinion/l-psychiatry-bears-guilt-in-brainwashing-tests-903788.html>; *U.S. to Pay \$750,000*, *supra* note 188; Shenon, *supra* note 188; Michael T. Kaufman, *Canada Supports a Suit Against US*, N.Y. TIMES, Jan. 29, 1984, <http://www.nytimes.com/1984/01/29/world/canada-supports-a-suit-against-us.html>; Laura A. Kiernan, *Canadians Sue US Over CIA Tests of Behavior Modification Methods*, WASH. POST, Dec. 12, 1980, at A44.

192. *Mission Statement*, U.S. DEP'T OF JUSTICE, (2012) <http://www.usdoj.gov/02organizations/>.

193. MCCOY, *supra* note 59, at 27 (citing CIA, Memorandum For: Director of Central Intelligence, Subject: Successful Application of Narco-Hypnotic Interrogation

universities.¹⁹⁴ The CIA documents reported that the agency conducted "several hundred hypnotic experiments," apparently with staff volunteers as subjects.¹⁹⁵ The report stated, "For a matter of record, the [CIA] case officers involved . . . expressed . . . that the ARTICHOKE operations were entirely successful and team members felt that the tests demonstrated conclusively the effectiveness of the combined chemical-hypnotic technique in such cases."¹⁹⁶

3. *Self-Inflicted Pain*

The second motif that was pivotal to conceiving the CIA's psychological interrogation program included discovering modes to ensure that captives felt personally responsible for their pain.¹⁹⁷ Unlike physical torture in which a *torturer* dispenses physical abuse that leaves marks on the victim, the CIA sought to shift guilt to the victim and render the interrogator to a less morally-compromising capacity.¹⁹⁸ CIA funding was channeled to prominent neurologists Lawrence Hinkle and Harold Wolff through the Human Ecology Society, an institute that they founded in 1953 concomitantly with the inception of CIA funding.¹⁹⁹

In 1955, Hinkle and Wolff inferred that the Soviets employed sensory deprivation procedures to induce stress, fear, and hallucinations without using instruments or drugs.²⁰⁰ The Soviets were inducing "Brain Syndrome" by depriving captives of food and water, decreasing oxygen intake, and imposing stress and exhaustion to impair brain functions and upset homeostasis.²⁰¹ Hinkle wrote:

The brain's 'internal milieu' . . . contains a number of organic and inorganic substances in solution; disturbances in the levels of these can adversely affect the way the brain functions . . . [Such fluctuations can also] impair other vital organs. The kinds of common conditions which may cause disturbances include

(ARTICHOKE), July 14, 1952; CIA, Memorandum for the Record, Subject: Project ARTICHOKE, Jan. 31, 1975).

194. MARKS, *supra* note 147, at 119.

195. MCCOY, *supra* note 59, at 27 (citing CIA, Memorandum for the Record, SUBJECT: Project ARTICHOKE, Jan. 31, 1975).

196. *Id.* (citing CIA, Memorandum For: Director of Central Intelligence, Subject: Successful Application of Narco-Hypnotic Interrogation (ARTICHOKE), July 14, 1952).

197. *Id.* at 45.

198. *See generally* Rejali, *supra* note 138.

199. MCCOY, *supra* note 59, at 45-46.

200. STREATFIELD, *supra* note 141, at 11-12 (citing HINKLE & WOLFF, "A REPORT OF COMMUNIST BRAINWASHING, #173492 Aug. 15, (1955)).

201. *Id.* at 115.

sweating, water deprivation, salt deficiency, excess water or salt, vomiting, diarrhea and burns. Some people when extremely anxious start breathing too rapidly and this can cause chemical changes in the blood which in turn can affect the brain. . . [The brain] is very quickly affected by any drop in sugar levels in the blood – sometimes again caused by over-anxiety. A deficiency of B vitamins in the diet can directly affect the brain . . . The ‘brain syndrome’. . . describes the progressive mental deterioration that occurs when the brain is seriously impaired. Initially a patient is restless and over-talkative, then gradually he becomes delirious, confused and finally loses consciousness.²⁰²

Hinkle and Wolff believed that the Soviets were able to impel captives to admit guilt and fabricate confessions because detainees were so mentally and emotionally demoralized that they could not ascertain between true and false.²⁰³ While these studies enumerated that the Soviets did not use chemical compounds in interrogation, later documents revealed that the CIA allocated \$5 million from 1955 to 1958 to administer experiments with “potentially useful secret drugs (and various brain damaging procedures),” and that it was the CIA’s obligation to produce “suitable subjects and a proper place for the performance of necessary experiments.”²⁰⁴

4. Adherence to Authority

a. Stanley Milgram’s Research

A third research finding elucidates explanations for interrogator compliance. In 1961, Stanley Milgram, a psychologist at Yale, conducted “Dynamics of Obedience” research.²⁰⁵ Experiments involved researchers escorting a subject-teacher, with demographically-diverse characteristics, into Yale’s laboratory and placing them individually before a machine labeled “Shock Generator Type ZLB” and the teacher was required to administer 15 to 400 volt electrical shocks on a helpless “student,” who

202. WINN, *supra* note 132, at 13-14.

203. STREATFEILD, *supra* note 141, at 12 (citing HINKLE & WOLFF, *supra* note 200) (“[The] victim . . . does not consciously change his value system; rather the change occurs despite his efforts. He is no more responsible for the change than is an individual who ‘snaps’ and becomes psychotic.”).

204. MCCOY, *supra* note 59, at 45-46.

205. *Id.* at 47; see also THOMAS BLASS, THE MAN WHO SHOCKED THE WORLD: THE LIFE AND LEGACY OF STANLEY MILGRAM, 65-72, 235-42 (2004).

was, unbeknownst to the teacher, an actor.²⁰⁶ Teachers asked questions and were directed to flip the switch on the shock generator when the students answered incorrectly.²⁰⁷ Researchers informed the teachers that the machine would discharge a painful shock but that shocks could not inflict permanent damage.²⁰⁸

The teachers listened to students provide a "little grunt" at 75 volts, a "violent scream" at 315 volts, remain silent at 330 volts, and ostensibly become unconsciousness at 450 volts.²⁰⁹ The participant administered progressively increasing shocks up to the 450 volt level with a close to 100% compliance rate when "teachers" were only requested to "assist" the "white coat" professional who was flipping the generator's switch.²¹⁰ When the white coat professional directed the participant to personally flip the switch and the victim could be heard but not seen, 65% of the participants complied up to the 450 volt level.²¹¹ However, if a non-authority figure instructed the teacher to administer the shock, compliance was zero.²¹² When the administrator was not present in the room, the teachers were more inclined to cheat and deliver lower voltage shocks.²¹³ Considering the findings a reflection on human nature, Milgram wrote:

A person who, with inner conviction, loathes stealing, killing and assault may find himself performing these acts with relative ease when commanded by authority. Behavior that is unthinkable in an individual who is acting in his own may be executed without hesitation when carried out under orders Facts of recent history and observation in daily life suggest that, for many people, obedience may be a deeply ingrained behavioral tendency, indeed a prepotent impulse overriding training or

206. MCCOY, *supra* note 59, at 48; *see also* WINN, *supra* note 132, at 102; *see also* Bell, *supra* note 11, at 360; *see also* Dr. Thomas Blass, *Milgram Basics*, STANLEYMILGRIM.COM, <http://www.stanleymilgram.com/milgram.php> (last visited Sept. 25, 2012).

207. WINN, *supra* note 132, at 102.

208. *Id.*

209. MCCOY, *supra* note 59, at 48; *see also* STANLEY MILGRAM, OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 1-43 (1974); *see also* ARTHUR G. MILLER, THE OBEEDIENCE EXPERIMENTS: A CASE OF CONTROVERSY IN SOCIAL SCIENCE (1986) (discussing the controversy over the Milgram experiments).

210. WINN, *supra* note 132, at 102-05; *see also* MCCOY, *supra* note 59, at 48.

211. Minow, *supra* note 140, at 30-31. Foreign scientists replicated the experiments and found that the obedience factor was sometimes even higher. *See also* MCCOY, *supra* note 59, at 48.

212. MCCOY, *supra* note 59, at 48.

213. WINN, *supra* note 132, at 106.

ethics, sympathy and moral conduct . . . The typical soldier kills because he is told to kill and he regards it as his duty to obey orders. The act of shocking the victim does not stem from destructive urges but from the fact that subjects have become ingrained into a social structure²¹⁴

b. Consequences of the Study

The study provided contributions. First, findings disconcerted presumptions about what was “normal” and “abnormal” behavior because ordinary Americans might not be expected to commit acts that would cause others pain.²¹⁵ Professor David Luban explained that Milgram demonstrated that we may “disapprove of destructive obedience, that we think we would never engage in it, and, more likely than not, that we are wrong to think we would never engage in it.”²¹⁶ Also, the prestige of Yale University literally “set the stage” for the experiments, and validated that organizational and hierarchical power and authority figures can inveigle ordinary people to engage in otherwise uncommon acts to inflict human suffering.

Second, the discoveries may affirm the ease of intelligence organizations and the military to acclimate individuals into a distinct culture that efficiently persuades agents and soldiers to accept authority more readily than civilian organizations. For example, when officials select individuals for special government positions, such as those that require security clearances, perchance hierarchal culture and directives breed a conformity and respect for the system that is even more influential than can be anticipated by batteries of psychological examinations.²¹⁷ Milgram accentuated another implication for national security operations when he noted that modern organizations rarely have one person exposed to a comprehensive understanding of all operations, but instead employees are compartmentalized and hold specialized jobs that range from desk positions with prosaic obligations to agents who may engage in esoteric and even unscrupulous activities.²¹⁸

214. *Id.* at 101, 108.

215. David J. Luban, *The Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE: LAWYER'S ROLES, RESPONSIBILITIES, AND REGULATION* 97 (Deborah C. Rhode ed., 2000).

216. *Id.*

217. Robert Bejesky, *Politico-International Law*, 57 *LOY. L. REV.* 29, 74-76 (2011); see also Scott M. Sullivan, *Private Force / Public Goods*, 42 *CONN. L. REV.* 853, 871 (2010) (“public soldiers are indoctrinated in military culture in order to . . . facilitate navigating the resulting moral minefield.”).

218. WINN, *supra* note 132, at 105-06.

Third, Milgram's findings ostensibly undermined commonly understood comparisons between "inculcated" and "inhumane" Soviets and civilized and humanitarian Americans.²¹⁹ Whenever questionable U.S. government acts were revealed, such as all of the CIA's research, the reflexive retort was that the Cold War justified the actions.²²⁰ People may disagree over the extent to which CIA tactics were necessary, but need not be flabbergasted that perfidious operations were ordered and conducted.

Fourth, perhaps militaries learned that agents would engage in otherwise unthinkable acts when hierarchy is properly organized and coordinated.²²¹ Kathleen Taylor, a research scientist at Oxford University, expounds how Milgram's findings are material to the military's aptitude for molding citizens from ones who regard killing as illegal and morally wrong to agents who will kill.²²² Taylor explained:

[T]he military emphasizes the importance of obedience to authority. As Stanley Milgram's experiments showed, persuading even highly socialized, liberal, and otherwise gentle people to harm others for a cause is frighteningly easy if the instructing authority is accepted If concrete justifications cannot be found, more abstract ones, citing threats to freedoms, values, or 'our way of life,' will be employed. . . Training emphasizes obedience, loyalty, and discipline . . . [I]ndependent thought is discouraged, and personal freedom is restricted.²²³

After the experiment, Milgram divulged to the "teachers" that the students were really actors, but observed that during the experiment many of his participant "torturers" were so stressed, tense, and nervous during the experiment about their decisions to administer shocks that they were "sweating, trembling, and stuttering."²²⁴ Military veteran William Menold conceded that he was an "emotional wreck" and a "basket case," and that he was shocked that "somebody could get me to do that stuff."²²⁵ Shortly after the public learned of Milgram's experiments, as they related to congressional investigations of MKUltra, CBS produced a movie called *The Tenth Level* (1976) that portrayed

219. McCoy, *supra* note 59, at 47-50.

220. *Id.* at 49.

221. *Id.*

222. TAYLOR, *supra* note 1, at 80.

223. *Id.*

224. MCCOY, *supra* note 59, at 48.

225. *Id.*

Milgram's character as mentally disturbed and endlessly apologetic for conducting the experiments.²²⁶ Milgram did repeatedly apologize for the experiments, and his career moved from Yale University to City University of New York.²²⁷ On December 20, 1984, Milgram died at the age of 55 of a heart attack.²²⁸ What makes the response to Milgram's findings research parochial is that the CIA, which funded atrocious research, and scientists who conducted even more controversial studies, did not suffer like Milgram. The fact that the CIA, as an elite organization, could recruit esteemed professionals to commit nefarious offenses for its MKUltra research agenda corroborates Milgram's findings.

Just as Milgram's study confirmed how authority figures can compel subordinates to act in a hierarchy, when scholars recently condemned abuses by interrogators on detainees as the acts of "bad apples," and when U.S. bureaucracies executed a war against Iraq without UN authorization premised only on baseless suspicions of prohibited weapons systems, both parties claimed they were following the orders of the White House.²²⁹ Perhaps a rotten apple tree presided within the Bush White House, and subordinates committing abuses were not deranged, but would be normally expected to conform to directives. Milgram concluded that "social convention led normal individuals to accept authority and ignore the victim's pain" and that those who might engage in torture were not "monsters" or the "sadistic fringe of society."²³⁰ Even if Americans know that U.S. government actors abuse other human beings, it does not require a stretch of the imagination to impel a considerable percentage of Americans to attune and accept the justifications that abusive interrogations are necessary in self-defense against the positions of so many legal scholars.²³¹ Even the premises intrinsic to the so-called "war on terrorism" involve an acclimation process of obedience to authority.

226. *The Tenth Level* (CBS television broadcast Aug. 26, 1976).

227. McCoy, *supra* note 59, at 49.

228. Daniel Goleman, *Dr. Stanley Milgram, 51, is Dead; Studied Obedience to Authority*, N.Y. TIMES, Dec. 22, 1984, at A29.

229. Bejesky, *supra* note 217, at 69-78.

230. McCoy, *supra* note 59, at 48.

231. See *supra* Part II.C.

5. Purported Deeper Conformity and the Cold War

a. Hypnosis

An explanation for what incited the CIA's research agenda in psychology was pronounced distress over the prospect of Soviet brainwashing and hypnosis during the 1940s and early 1950s.²³² Perhaps concerns seemed even more resolute due to academic research prior to the Cold War. For example, in 1939, Professor Lloyd Rowland, in the *Journal of Abnormal and Social Psychology* studied how allegedly hypnotized individuals could be trained to grab into a wooden box containing a rattlesnake because they were conditioned to believe that the snake was really a piece of rubber tubing.²³³ Dr. John G. Watkins believed that pseudo-events or memories could be implanted to make a subject perceive the world in a manner consistent with those suggestions instead of reality.²³⁴ In *Hypnotism* (1943), Psychology Professor George H. Estabrooks emphasized that hypnotism had numerous applications for intelligence operations and noted that most of the details were classified.²³⁵

In 1947, U.S. Army Dr. J.G. Watkins reported in the *Journal of Abnormal and Social Psychology* that he had successfully hypnotized soldiers so that they would discharge attack orders that included killing against their conscious will, and maintaining or divulging classified secrets in a trance-like state.²³⁶ Members of the U.S. Congress were skeptical, but Irving L. Janis, a psychologist at Yale University, produced a report for the Air Force and claimed that hypnosis, drug use, and electroshock can "induce a somnambulistic trance" that would render a mind-control to elicit false confessions, such as in the "Soviet Show

232. STREATFEILD, *supra* note 141, at 141 (French studies dating back to the late-eighteenth century claimed that people could be hypnotized to commit crimes).

233. *Id.* at 162 (citing Lloyd Rowland, *Will Hypnotized Persons Try to Harm Themselves or Others?*, 34 J.ABNORMAL PSY. 114-17 (1939)).

234. John G. Watkins, *Antisocial Behavior Under Hypnosis: Possible or Impossible?* 20 INT'L J. CLINICAL & EXPER. HYPNOSIS 101, 108 (1972), available at <http://www.psych.upenn.edu/history/orne/ornejceh19722101117.html>.

235. STREATFEILD, *supra* note 141, at 149 (citing George H. Estabrooks, *Hypnosis Comes of Age*, SCI. DIGEST, Apr. 1971) (noting that one "virtually foolproof" approach was called "Hypnotic Messenger," in which an agent could be hypnotized to deliver a message from one person to another without ever having any conscious knowledge of the message, be re-hypnotized to reveal the secret message, and even "lock" the message so that it could only be accessed by the person(s) who knew the code/combination).

236. *Id.* at 144-47.

Trials,” which involved alleged conspirators publicly confessing to planning to overthrow the Soviet government.²³⁷

For example, six weeks after the highly-publicized apparent kidnapping of Dr. András Zakar, personal secretary to József Mindszenty, the head of the Catholic Church in Hungary,²³⁸ Zakar returned babbling, disoriented, confused, and giggling.²³⁹ He volunteered incriminating documents about Mindszenty and testified against Mindszenty in his criminal trial.²⁴⁰ Mindszenty compliantly testified “that he had orchestrated the theft of Hungary’s crown jewels,” derived a scheme to “remove the Communist government,” and planned a “Third World War.”²⁴¹ Personal friends, high-ranking individuals, and even Pope Pius XII believed that Mindszenty’s behavior was perplexing and that his confession was coerced.²⁴² Details of the Moscow Show Trials and comparisons in conjunction with the Mindszenty case inundated the European media as an enigma.²⁴³

In another example, on the morning of March 29, 1951, Palle Hardrup robbed the Landsmandsbanken in Copenhagen and shot and killed two tellers.²⁴⁴ After months of psychological assessments, drug injections, and hypnosis, some experts opined that Hardrup had been hypnotized in a multi-layer approach to commit the crime by his former prison cell mate, Bjorn Nielsen, at Horsens State Prison.²⁴⁵ A jury convicted Nielsen in 1954 for planning and urging the robberies and that he used a hypnotic skill to exert “systematic influence” over Hardrup to perpetuate the robbery.²⁴⁶ Nielsen went to prison and Hardrup was confined in a psychiatric institution.²⁴⁷ After being released, Nielsen

237. *Id.* at 4-5; MCCOY, *supra* note 59, at 22 (citing IRVING L. JANIS, ARE THE COMINFORM COUNTRIES USING HYPNOTIC TECHNIQUES TO ELICIT CONFESSION IN PUBLIC TRIALS 1, 3, 6-7, 16-20 (1949); WALTER BOWART, OPERATION MIND CONTROL 67-71, 109-10 (1978)).

238. STREATFEILD, *supra* note 141, at 1.

239. *Id.*

240. *Id.* at 2.

241. *Id.* at 2-3.

242. *Id.* at 3-4. Newspapers, the British Foreign Office, American authorities, and research institutions were skeptical and bewildered. *Id.* at 3-4. They openly speculated that Mindszenty had been drugged and/or hypnotized. *Id.* at 6, 21.

243. *Id.* at 4-5 (citing DAILY MAIL, Dec. 31, 1948; DAILY MAIL, Feb. 7, 1949; DAILY TELEGRAPH, Feb. 2, 1949; REUTERS, Feb. 5, 1949; EVENING STANDARD, Feb. 8, 1949; THE TIMES, Jan. 21, 1949; THE TIMES, Feb. 8, 1949).

244. STREATFEILD, *supra* note 141, at 135-36.

245. *Id.* at 163 (citing CIA, *Hypnosis and Covert Operations*, May 5, 1955 (the CIA acknowledged the Hardrup case, but concluded that Nielsen was only a “rank amateur” because he got caught)).

246. *Id.* at 169.

247. *Id.*

committed suicide, and on August 5, 1972, Palle Hardrup stated that he had not been hypnotized, but had faked the defense as a way to "get off the hook."²⁴⁸

b. Real or Propaganda?

Edward Hunter was the forerunning American journalist and author of two books that consolidated related stories, advocated Red Scare threats, and explained that "'psychological warfare' . . . must be stopped and counteracted . . . if we ourselves are to be safe."²⁴⁹ In an article in the *Miami Daily News* on September 24, 1950, Hunter coined the term "brainwash" to bastardize the Chinese and Soviets.²⁵⁰ Kathleen Taylor called Hunter's books "fine pieces of propaganda" as they "emphasize the deliberate, mechanistic malice of the Communist enemy."²⁵¹ She questioned, "Does it actually exist, or is it a totalitarian fantasy, dreamt up by an American journalist to describe the menace of a . . . [foreign] culture?"²⁵² Other publications with mysterious origins surfaced and reported that the Soviets intended to brainwash the masses with esoteric interrogation techniques.²⁵³ In late 1953 and before the UN Security Council, Dr. Charles W. Mayo claimed that Soviets were involved in "brainwashing and menticide techniques" using torture, Pavlovian conditioning, and drugs.²⁵⁴ At the same time, Americans were accosted

248. *Id.* at 170.

249. MCCOY, *supra* note 59, at 25 (citing EDWARD HUNTER, *BRAIN-WASHING IN RED CHINA: THE CALCULATED DESTRUCTION OF MEN'S MINDS* 4, 10-12, 301-02, 340 (1951)). In two books, Hunter claimed the Soviets and Chinese were using Pavlovian conditioning to persuade people to accept socialism and used the Soviet Show Trials, the Mindszenty case, and Korean POWs as evidence of danger. STREATFEILD, *supra* note 141, at 14-15; see also EDWARD HUNTER, *BRAINWASHING: THE MEN WHO DEFIED IT* (1956); EDWARD HUNTER, *BRAINWASHING: FROM PAVLOV TO POWERS* (1960).

250. STREATFEILD, *supra* note 141, at 15 (Hunter explaining in his books that "the intent . . . is to change a mind radically so that its owner becomes a living puppet.").

251. TAYLOR, *supra* note 1, at 4.

252. *Id.* at 6.

253. In 1955, national security sources claimed that a mysteriously arising document called *Brainwashing: A Synthesis of the Communist Textbook on Psycho-politics* was a translation of a secret speech given by Soviet KGB head Lavrenti Beria in Moscow in 1950, and in that speech Beria explained Soviet plans to conduct severe interrogation with drugs and torture to subvert peoples' minds and drive them insane. STREATFEILD, *supra* note 141, at 24 (many sources expressed doubt and one group doing the translation stated that it faked the note during the translations).

254. *Id.* at 24 (citing Joost Meerloo, *Pavlovian Strategy as a Weapon of Menticide*, AMER. J. PSY., May 1954); see also MCCOY, *supra* note 59, at 24-25 (citing G.H. Estabrooks & Leslie Lieber, *Hypnosis: Its Tremendous Potential as a War Weapon Is Revealed Here for the First Time*, ARGOSY, 26-29, 90-92 (Feb. 1950) (explaining that "hypnotism was full-fledged science" and that "a small corps of carefully trained

with McCarthyism and Un-American Committees, which pitted communism against capitalism in the wake of security threats.²⁵⁵

Hunter testified to the peril before the U.S. Congress's Committee on Un-American Activities during its inquiry into the apprehension that communists were insistent on "captur[ing] intact the minds of the people and their possessions" to place humanity in a "modern conception of slavery."²⁵⁶ Later it was revealed that Hunter, who was on a crusade to warn Americans of "brainwashing," was an undercover CIA agent and a former psychology warfare specialist at the Pentagon.²⁵⁷ It is unclear whether the threat of hypnotic warfare was real, but due to the hype, the CIA demonstrated a keen interest in studying mind-control.²⁵⁸ Between 1949 and 1952, the CIA produced reports and claimed that it was "a reasonable certainty . . . that confessions in high-level trials . . . in Russian-dominated areas are prepared by hypnosis,"²⁵⁹ and that "radical personality change[s]" of confessions must have been due to hypnosis, physical duress, drugs, and electric shock.²⁶⁰ CIA Director Allan Dulles emphasized that the Soviet's secret psychological "brain warfare" produced "perversion of the minds of selected individuals," deprived subjects of their free will, and conditioned them to be "parrot-like" so

hypnotists attached to an armed force" could develop "a uniquely dangerous army of hypnotically controlled" soldiers). Dr. Herbert Spiegel expressed, "It is very possible to distort and change somebody's mind through a number of hypnotic sessions. It can be described as brainwashing because the mind is cleared of its old emotions and values which are replaced by implanting other suggestions." WINN, *supra* note 132, at 148; *see also* ROBERT J. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* 3-4 (1989) (Psychiatrist noting that it was an "all powerful, irresistible, unfathomable, and magical method of achieving total control over the human mind.").

255. Bejesky, *supra* note 22, at 19-29.

256. STREATFEILD, *supra* note 141, at 25 (citing *Communist Psychological Warfare (Brainwashing): Hearing Before the H. Comm. on Unamerican Activities* 58th Cong. (1958) (testimony of Edward Hunter)).

257. Colin A. Ross, *Bluebird: Deliberate Creation of Multiple Personality by Psychiatrists* (2000), available at <https://sites.google.com/site/mcraais/bluebird>. Some researchers regard him as "the greatest brainwashing evangelist." STREATFEILD, *supra* note 141, at 25.

258. MCCOY, *supra* note 59, at 22.

259. STREATFEILD, *supra* note 141, at 143 (citing CIA, REPORT NO. 1 OF TRIP TO EUKOM AND USFA, JUNE 22 - AUG. 7 1949, (1949); CIA, OVERALL REPORT ON TWO-MONTH [DELETED] TRIP, (1949)).

260. MCCOY, *supra* note 59, at 23, 47 (citing FOREIGN AND MILITARY INTELLIGENCE, BOOK I: FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENT OPERATION WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755- at 393 (1976)); JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* 202-04 (1986)).

that they only “repeat[ed] thoughts which have been implanted in their minds.”²⁶¹

The CIA administered experiments on other CIA employees, military personnel, doctors, other government agents, and members of the general public without their knowledge.²⁶² The CIA allegedly hypnotized several hundred staff members to perform “nonsense movements,” and other employees to obliviously perform actions in a room of people, accept and carry out orders from others without knowledge, and memorize and forget information with code-words.²⁶³ Documents dated from the early- to mid-1950s indicate that the CIA postulated using hypnosis for intelligence operations, to induce unwilling subjects to perform acts against their will, alter personalities, commit crimes, and divulge or protect classified information.²⁶⁴ In what were either experiments or hypothetical operations, the CIA proposed using hypnosis with drugs in intelligence operations and for assassinations in which the perpetrator

261. MCCOY, *supra* note 59, at 24 (citing CIA, Summary of Remarks by Mr. Allan W. Dulles at the National Alumni Conference of the Graduate Council of Princeton University, Hot Springs, VA, (Apr. 10, 1953); Alan Schefflin, *Freedom of the Mind as an International Human Rights Issue*, 3 HUM. RTS. J. 49 (1982).

262. WINN, *supra* note 132, at 149. CIA Director Dulles indicated that a limitation on the studies was that there were “no human guinea pigs [on which] to try these extraordinary techniques.” MCCOY, *supra* note 59, at 29; *see also* MARKS, *supra* note 147, at 31, 131.

263. STREATFEILD, *supra* note 141, at 151-54, 158, 165-66; *see also* MCCOY, *supra* note 59, at 27 (citing CIA, [Report Title], in NATIONAL SECURITY ARCHIVE, BEHAVIOR CONTROL EXPERIMENTS COLLECTION). Recent scientific studies have discovered that hypnotized people who try to remember forgotten information do not necessarily “remember more” but they “say more,” most of which is just guessing, filling in the blanks, and speculation, which means hypnosis naturally compromise memory accuracy instead of improve it. DANIEL REISBERG, *COGNITION: EXPLORING THE SCIENCE OF THE MIND* 215 (2d ed. 2001).

264. STREATFEILD, *supra* note 141, at 159-61 (citing File, CIA, Special Research, BLUEBIRD [deleted], (Jan. 1, 1951); File, CIA, [deleted], Interview with, (Feb. 25, 1952); File, CIA, SI AND H EXPERIMENTATION, (Sept. 18, 1951); File, CIA, SI and H Experimentation, (Sept. 25, 1951). The CIA’s training video, *The Black Art* (1953), shows a U.S. agent drugging an “Oriental” diplomat to carry out a mission and divulge information without any knowledge that he was even drugged by using hypnotism. STREATFEILD, *supra* note 141, at 160. There are many reasons courts have recognized problems with using hypnosis – *hypermnnesia or confabulation* (the subject fills in gaps with false material), *hypnotic recall* (something is felt or thought during hypnosis that became integrated into original memory) and *memory hardening* (a real or bad memory is supplanting by something new solely because of the drug or hypnotic procedures). *How Reliable Are Things Remembered Under Hypnosis?*, THE AM. BD. OF HYPNOTHERAPY, (Sept. 25, 2012) <http://www.abh-abnlp.com/faq/faq3.html>. These may be the same reasons that the CIA believed that hypnosis could be useful for alternative purposes.

would be incognizant of the act.²⁶⁵ From a later released memo, Allan was fascinated with the possibility of establishing hypnotic control over a clandestine agent.²⁶⁶ If these experiments or operations were successfully administered, there is no reason to believe the CIA is telling the truth when it insists the projects were abandoned since the CIA is “in the lying business.”²⁶⁷ Other accounts maintained that the hypnosis approaches were not successful,²⁶⁸ which suggests that the Soviet threat was also severely aggrandized.

IV. IMPLEMENTING RESEARCH

A. MKUltra: Using Drugs in Interrogation

1. A Secret and Controversial Agenda

One of the most abusive violations of free consciousness involves the use of chemical substances to interrogate or alter mental processes. Professor John Ip wrote: “Beginning in the 1940s, the CIA tested over one hundred and fifty substances to determine whether they might be effective for use in interrogation.”²⁶⁹ Through 1962, the CIA expended billions in U.S. taxpayer dollars to fund research in “hallucinogenic drugs, electric shock, and sensory deprivation.”²⁷⁰ Drugs could be used for (1) extracting “information from unwilling subjects,” (2) protecting CIA agents from others’ extracting information from them, (3) controlling “activity of individuals whether they wish it or not,” and (4) “preventing control by others of our agents.”²⁷¹ An additional goal seemed to entail using chemical compounds to ensure that agents who knew too much would not reveal classified programs.²⁷²

265. STREATFEILD, *supra* note 141, at 150, 162, 164 (citing File, CIA, ARTICHOKE 8-15 (Jan. 1954); File, CIA, HYPNOTIC EXPERIMENTATION AND RESEARCH, (Feb. 10, 1954).

266. *Id.* at 154.

267. *Id.* at 167, 169.

268. The CIA later released documents claiming that they had long been disagreeing with Estabrooks’s hypnosis practices and rejecting his offers of assistance. *Id.* at 150-52.

269. Ip, *supra* note 59, at 85.

270. MCCOY, *supra* note 59, at 7, 23.

271. STREATFEILD, *supra* note 141, at 48 (citing File, CIA, Organisation of SO components Dealing with ARTICHOKE (Jan. 1, 1951)). Operation BLUEBIRD had similar goals of extracting and protecting information. *Id.* at 26 (citing File, CIA, Discovering means of conditioning personnel (goals of project BLUEBIRD): Behavioral Drugs (Jan. 1, 1975)).

272. *Id.* at 223-225 (citing File, CIA, Disposal of Maximum Custody Type Defectors, (Mar. 7, 1951); File, CIA, Evaluation of the Medical Staff’s Contribution to BLUEBIRD, (Mar. 3, 1952); File, CIA, ARTICHOKE Conference (July 30, 1953); File, CIA,

Congressional investigations in the early 1970s discovered that CIA studies, experiments, and methods were shrouded in secrecy and lacked oversight.²⁷³ U.S. military intelligence officials participated in subprojects but only the CIA Director and key individuals were privy to the larger umbrella programs, such as BLUEBIRD (1951), ARTICHOKE, and MKUltra (1953).²⁷⁴ In the early 1960s, the CIA's Inspector General discovered (or expressly acknowledged) the program, noted the intense secrecy as only key individuals were involved, and condemned the program in a twenty-four page report by noting that "research in the manipulation of human behavior is considered by many authorities in medicine . . . to be professionally unethical" and illegal, particularly when drugs are involuntarily used on subjects.²⁷⁵ CIA Director Helms rebuffed the report and continued the program, claiming that the CIA has had a "mission of maintaining a capability for influencing human behavior," and required a covert "operational capability to use drugs."²⁷⁶

2. Records and Investigations

a. MKUltra

MKUltra involved at least 149 projects and thirty-three subprojects, which all involved control over human consciousness,²⁷⁷ frequently with

SUBPROJECT 54, (Dec. 6, 1955); HUMAN DRUG TESTING BY THE CIA, 1977: Hearing Before the S. Subcomm. on Health and Scientific Research of the Comm. on Human Resources 95 Cong. 90 (1977) (testimony of Charles Geschickter); File, CIA, AMNESIA: Drug Card Index, (Jan. 1, 1956); File, CIA, ARTICHOKE, (Dec. 3, 1951)).

273. MCCOY, *supra* note 59, at 28 (citing FOREIGN AND MILITARY INTELLIGENCE, *supra* note 260, at 404-05) (Helms "felt it necessary to keep details of the project restricted to an absolute minimum number of people.").

274. In April 13, 1953, CIA Director Dulles hired Dr. Stanley Gottlieb to run the MKUltra program and it was supervised by one person – future CIA Director Richard Helms. MCCOY, *supra* note 59, at 28 (citing FOREIGN AND MILITARY INTELLIGENCE, *supra* note 260). In August 1951, BLUEBIRD was renamed ARTICHOKE and in April 1953, was renamed MKUltra. STREATFEILD, *supra* note 141, at 27, 48; *see also* MCCOY, *supra* note 59, at 31 (citing CIA, PROJECT NM 001 056.0, (1952)); H.E. Page, *The Role of Psychology in ONR*, 9 AMER. PSY. 621-22 (1954) (noting that the Navy's Office of Naval Research initiated a covert Psychological Sciences collaborated with the CIA and by 1952 had 117 research contracts at fifty-eight universities (with names generally held secret) worth hundreds of thousands of dollars.).

275. MCCOY, *supra* note 59, at 29, 50 (citing SENATE, *supra* note 260, at 390-91, 422).

276. *Id.* at 50.

277. *Id.* at 26, 28 (citing ADVISORY COMM. ON HUMAN RESEARCH EXPERIMENTS, DEPT., Chapter 3: *Supreme Court Dissents Invoke the Nuremberg Code: CIA and DOD Human Subjects Research Scandals*,

chemical compounds. MKUltra sponsored associations with the Pentagon, USAid, foreign governments, esteemed psychologists, physicians, and distinguished researchers at more than 200 universities and medical facilities.²⁷⁸ On the floor of the Senate in 1977, Senator Ted Kennedy pointed out that “the Deputy Director of the CIA revealed that over thirty universities and institutions were involved in an ‘extensive testing and experimentation’ program which included covert drug tests on unwitting citizens Several of these tests involved the administration of LSD.”²⁷⁹ While the claim was never verified, the CIA’s rationale for experimenting was that “the Russians had bought the world supply.”²⁸⁰ With regard to the CIA’s use of chemical compounds in interrogation, CIA Director Turner testified that truth serum research was required because other countries were developing truth serum that would be used on U.S. citizens.²⁸¹

MKUltra remained secret for various reasons. The CIA compartmentalized MKUltra projects and filtered research into many directions.²⁸² Apparently because esteemed academics and scientists preferred not to be associated with controversial research, they frequently did not sign contracts connecting them to the research, but instead utilized front organizations to receive grants, and produced secret reports for the CIA.²⁸³ Some percentage of researchers may not have been aware

http://hss.energy.gov/healthsafety/ohre/roadmap/achre/chap3_4.html (last visited Oct. 20, 2012)); STREATFEILD, *supra* note 141, at 83; *see also* Jason R. Odesheo, *Truth or Dare?: Terrorism & “Truth Serum” in the Post-9/11 World*, 57 STAN. L. REV. 209, 220-21 (2004).

278. MCCOY, *supra* note 59, at 6, 8, 29; *see also* John Stockwell, Lecture, The Secret Wars of the CIA, (Oct. 1987), available at <http://www.informationclearinghouse.info/article4069.htm>.

279. *Project MKUltra, the CIA’s Program of Research in Behavioral Modification: Joint Hearing Before the S. Select Comm. on Intelligence, and Subcomm. on Health and Scientific Research of the Comm. on Human Res.*, 95th Cong. 2 (1977), available at <http://www.druglibrary.org/schaffer/history/e1950/mkultra/Hearing01.htm>.

280. MCCOY, *supra* note 59, at 29-30 (explaining the scientist producing LSD later admitted that he sold large quantities of LSD to US agencies and that US agencies inquired about procedures for producing large quantities.); *see also* JAMES E. STARRS & KATHERINE RAMSLAND, *A VOICE FOR THE DEAD* 107 (2005).

281. Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT’L L. REV. 521, 589 (2005).

282. MCCOY, *supra* note 59, at 31-33, 47.

283. *Id.* at 28-29 (citing FOREIGN AND MILITARY INTELLIGENCE, *supra* note 260, at 390-91; MARKS, *supra* note 147, at 58-61); STREATFEILD, *supra* note 141, at 65-67. With public pressure, President Ford appointed Vice President Rockefeller to head another investigation, but the Rockefeller and Ford Foundations channeled between \$7 and \$13 million to the CIA’s psychological research during the 1950s. MCCOY, *supra* note 59, at 31.

that they were being funded by the CIA or that their projects were part of a larger CIA research agenda.²⁸⁴ Likewise, the CIA adopted a more general approach of frequenting and combing academic conferences to obtain useful research and recruit academics.²⁸⁵

b. CIA Drug Experiments

The CIA's intention was to acquire knowledge and experience with the application of LSD so that the drug could be exploited overseas in real world applications.²⁸⁶ Accounts emerged of the CIA and military intelligence units injecting drugs into North Korean POWs during the Korean War, using LSD on thousands of U.S. soldiers without their knowledge at Maryland's Edgewood Chemical Arsenal,²⁸⁷ and conducting both voluntary and involuntary LSD tests on employees.²⁸⁸ In a documentary, James R. Thornwell, a military officer, explained how he was falsely accused of stealing classified documents in 1961, held in solitary confinement for six weeks, interrogated, denied food and water, given LSD, and kept in sensory deprivation.²⁸⁹ In *United States v. Stanley*, the Army apparently involuntarily subjected Master Sergeant Stanley to LSD experimentation,²⁹⁰ which made him suffer radical emotional and personality conversions, memory loss, hallucinations, and family trauma. However, the Court dismissed his claim against the

284. MCCOY, *supra* note 59, at 47 (citing HARVEY M. WEINSTEIN, *PSYCHIATRY AND THE CIA: VICTIMS OF MIND CONTROL* 130, 179-80 (1990)).

285. MCCOY, *supra* note 59, at 31-32, 37; *see also* Bell, *supra* note 11, at 356.

286. Troy Hooper, *Operation Midnight Climax: How the CIA Dosed S.F. Citizens with LSD*, SFWEEKLY, Mar. 14, 2012, <http://www.sfweekly.com/2012-03-14/news/cia-lsd-wayne-ritchie-george-h-white-mk-ultra/2/>.

287. MCCOY, *supra* note 59, at 27, 29 (citing MARKS, *supra* note 147, at 23); *see also* ALEXANDER COCKBURN & JEFFREY ST. CLAIR, *WHITEOUT: THE CIA, DRUGS, AND THE PRESS* 153-61 (1998).

288. STREATFEILD, *supra* note 141, at 68 (citing *Mission: Mind Control* (ABC News Documentary 1979); CIA, *POTENTIAL NEW AGENT FOR UNCONVENTIONAL WARFARE*, (1954)). A joint CIA-Army Intelligence project began in November 1957 on "volunteers" to test how well interrogators could obtain classified information from participants under the influence of LSD. *Id.* at 68 (citing Letter from U.S. Army Chemical Warfare Laboratories (ACC), to Commanding Gen., U.S. Army Intelligence Ctr., Proposed Plan for Field Experimentation with EA 1279 (Mar. 19, 1959)).

289. The military never proved that he stole classified documents. STREATFEILD, *supra* note 141, at 88.

290. *United States v. Stanley*, 483 U.S. 669, 671 (1987).

military.²⁹¹ The *Feres-Stencel* doctrine bars liability for soldier claims against the government that are “incident to the service.”²⁹²

Congressional investigations also revealed a 1963 CIA document that stated the CIA should conduct human testing inside the U.S. because of the apprehension that drug testing in foreign countries was becoming so widespread that foreign populations were fully aware of the activity.²⁹³ In 1979, the ABC documentary *Mission Mind Control* chronicled how the CIA conducted experiments in the U.S. under the codename “Operation Realism,” which entailed operatives furtively spiking drinks and food of unwitting U.S. citizens at parties, restaurants, and bars; prostitutes slipping LSD to customers; and scientists using various methods to modify behavior of prison populations.²⁹⁴ Operatives conducted tests primarily on the “borderline underworld” of “[p]rostitutes, drug addicts and other small-timers who would be powerless to seek any kind of revenge in case they found out” that they had been drugged for CIA experimentation.²⁹⁵

Similar LSD testing was occurring in Britain. In 2006, plaintiffs won legal compensation as a result of the British MI6’s LSD testing that occurred in 1953 and 1954.²⁹⁶ The plaintiff knew that they were involuntarily subjected to LSD experiments but the documents providing evidence of the experiments were classified for half a century.²⁹⁷ The documents providentially surfaced because of a 2004 investigation indicating that British aircraftsman Ronald Madison had been killed by a British sarin nerve agent experiment in 1953.²⁹⁸

291. *Id.* at 671-672.

292. *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 673-74 (1977); *Feres v. United States*, 340 U.S. 135, 138 (1950).

293. STREATFEILD, *supra* note 141, at 83, 87 (citing FOREIGN AND MILITARY INTELLIGENCE, *supra* note 260, at 390-91 (explaining the CIA wanted to use the techniques to control foreign leaders in a way that they would not even know what happened to them)).

294. MCCOY, *supra* note 59, at 29 (citing *Project MKUltra*, *supra* note 279, at 7, 12, 21, 57, 91-92; MARKS, *supra* note 147, at 31-32, 88-95). Operation Midnight Climax used massage parlors to lure people into LSD experiments. STARRS & RAMSLAND, *supra* note 280, at 109. Congressional investigations revealed that “prior consent was obviously not obtained from any of the subjects.” ADVISORY COMM. ON HUMAN RESEARCH EXPERIMENTS, DEPT, *supra* note 277; Rupert Cornwell, *Obituary: Sidney Gottlieb*, INDEPENDENT, Mar. 16, 1999, available at <http://www.independent.co.uk/arts-entertainment/obituary-sidney-gottlieb-1080920.html>.

295. STREATFEILD, *supra* note 141, at 84.

296. Rob Evans, *MI6 pays out over secret LSD mind control tests*, GUARDIAN, Feb. 24, 2006, <http://www.guardian.co.uk/uk/2006/feb/24/military.past>.

297. STREATFEILD, *supra* note 141, at 73-74 (citing File, CIA, PRO: DEFE 10/36, (Mar. 6, 1956); File, CIA, WO 32/220163, (June 19, 1964)).

298. *Id.* at 74.

3. Remembering Facts or Crafting Fantasy: What Did the CIA Learn?

CIA documents reported that drugs, such as truth serum, could be successful in prodding a subject to involuntarily divulge information in between 50 and 75% of all cases.²⁹⁹ CIA operatives possessed manuals with step-by-step cooking recipe-like instructions for effective interrogation with drugs.³⁰⁰ However, medical studies, hospital documentation, and later released classified documents indicated that using drugs on people as a means of attaining accurate information or for reconstituting missing memories yielded mixed success.³⁰¹ People subjected to drug-induced questioning frequently did not recall facts, but instead invented fantasies and sometimes believed contrived accounts even when they could not have possibly engaged in what they were revealing.³⁰² Some subjects became bemused and were unsure of the truth after the drugs wore off,³⁰³ which should be unsurprising given the mortifying mental status of some of Dr. Ewen Cameron's patients who lost memories and identities.³⁰⁴ Even Operation BLUEBIRD documents revealed that the CIA had two broad purposes with these programs – to acquire accurate information during interrogations and to coerce subjects to behave in a manner contrary to free will.³⁰⁵ The latter goal is akin to current medical treatments.

299. *Id.* at 48-50 (citing File, CIA, SUGAR: BLUEBIRD Project, (Nov. 4, 1950); File, CIA, TD Material, (Apr. 5, 1946) (noting that “[w]ork was conducted into the use of individual drugs such as sodium amytal, scopolamine and marijuana but the teams’ specialization was the use of cocktails of drugs,” such as by mixing sodium amytal or pentothal (barbiturates/depressants) with Benzedrine or methedrine (amphetamines/stimulants)); Clarke, *supra* note 124, at 32 (noting the CIA and other intelligence services had limited success with “truth serums”); *Id.* at 50-51, 53 (citing File, CIA, BLUEBIRD, (Mar. 12, 1951), (Mar. 13, 1951), (Mar. 19, 1951); File, CIA, ARTICHOKE Operation, (June 1952); File, CIA, ARTICHOKE Cases, June 1952-deleted (July 8, 1952); File, CIA, ARTICHOKE Cases (July 9, 1952); File, CIA, ARTICHOKE Techniques (deleted) and (deleted), (June 21, 1952)) (“[E]arly CIA records are scattered with reports” referring to “interrogation teams in the early 1950s being sent under BLUEBIRD and ARTICHOKE to conduct interrogations around the world, particularly in Korea, and that they successfully used drugs like sodium amytal, Benzedrine, coramine and picrotoxin).

300. *Id.* at 49-50.

301. *Id.* at 54-55.

302. *Id.* (citing Lincoln D. Clark & Henry K. Beecher, *Psychopharmacological Studies on Suppression*, 125(2) J. OF NERV. MENTAL DISORDERS 316 (1957).

303. STREATFEILD, *supra* note 141, at 55.

304. *See supra* Part III(B)(2)(b).

305. STREATFEILD, *supra* note 141, at 48 (citing CIA, *Special Interrogations*, Feb. 12, 1951; CIA, *BLUEBIRD Special Recommendations re: Personnel Requirements and*

Sodium pentothal is presently administered to reduce inhibitions and make people more talkative,³⁰⁶ but is also employed by anesthesiologists and behavior modification clinics as a medical therapy to treat psychological disorders and modify personalities.³⁰⁷ Dr. Balasa Prasad, a Mount Vernon anesthesiologist, used sodium pentothal to treat hundreds of patients from 1990 to 2001, and realized a 95% success rate for phobic patients, 90% for alcoholics, and 75% for smokers.³⁰⁸ The drug is evidently effective in changing personality and memory. This conclusion was recently addressed in the context of international negotiations over torture scandals. Other governments expounding that truth serum can permanently alter the subject's personality, make detainees succumb to questioning, and coerce "the subject to betray his belief system."³⁰⁹ Courts have refused to admit evidence in criminal trials where sodium pentothal and other "truth drugs" had been used to elicit testimony because of privacy protections, the right against self-incrimination, and lack of accuracy.³¹⁰

CIA records from Project ARTICHOKE in July 1952 indicated that drug-induced coercion techniques were "entirely successful" based on hundreds of experiments,³¹¹ which would logically be one underlying reason MKUltra was initiated and LSD testing was included in MKUltra.

Training, Mar. 3, 1951; CIA, *Organization*, *supra* note 246); *see supra* Parts III(B)(2), III(B)(5), IV(A)(1) (noting how sensory-deprivation environments and subconscious states were used to coerce the mind).

306. Kevin Johnson & Richard Willing, *Ex-CIA chief revitalizes 'truth serum' debate*, USA TODAY, Apr. 26, 2002, available at <http://www.usatoday.com/news/nation/2002/04/26/torture.htm> (Sodium Pentothal becomes a "truth serum" making people become more communicative and willingly to share their thoughts). Keller, *supra* note 281, at 531; John MacDonald, *Truth Serum*, 46 J. CRIM. L. & CRIMINOLOGY 259-63 (1955); Alison Winter, *The Making of Truth Serum*, 79 BULLETIN OF THE HIST. MED. 500-33 (2005).

307. James V. O'Connor, *Health Care; Truth Serum as Behavior Modification*, N.Y. TIMES, July 22, 2001, available at <http://www.nytimes.com/2001/07/22/nyregion/health-care-truth-serum-as-behavior-modification.html>.

308. *Id.*

309. Keller, *supra* note 281, at 592-93.

310. *Lindsey v. United States*, 237 F.2d 893, 895-96 (1956) (quoting from law review articles, the court noted: "[E]xperimental and clinical findings indicate that only individuals who have conscious and unconscious reasons for doing so are inclined to confess and yield to interrogation under drug influence. On the other hand, some are able to withhold information and some, especially character neurotics, are able to lie. Others are so suggestible they will describe, in response to suggestive questioning, behavior which in fact never occurred"); *See generally* Odesho, *supra* note 277.

311. McCoy, *supra* note 59, at 27 (citing CIA, Memorandum For: Director of Central Intelligence, Subject: Successful Application of Narco-Hypnotic Interrogation (ARTICHOKE), July 14, 1952; CIA, Memorandum for the Record, SUBJECT: Project ARTICHOKE, Jan. 31, 1975)).

Another CIA officer testified before Congress to defend LSD experimentation because of Cold War threats and recounted that LSD was "the one material . . . that really had potential fantastic possibilities."³¹² Other CIA officials testified to Congress and contended the program was a failure.³¹³ In his book, Dominic Streatfeild summarizes testimony from Dr. Stanley Gottlieb, the chief scientist on MKUltra at the 1975 Church Senate Intelligence Committee, as "a laughable performance . . . in which he claimed to have forgotten virtually everything he had spent the last twenty-five years researching."³¹⁴ In testimony to the Senate in 1977, CIA psychologist John Gittinger expressed that "the general idea we were able to come up with is that brain-washing was largely a process of isolating a human being, keeping him out of contact, putting him under long stress in relationship to interviewing and interrogation, . . . without having to resort to any kind of esoteric means."³¹⁵

Allegations of "brainwashing" still float about, but of course it is not the CIA that is involved. On March 22, 2004, *The Times* reported, "Terrorists linked with al-Qaeda are increasingly recruiting young Iraqis to carry out suicide bombings, brainwashing them with Osama bin Laden's sermons and drugging them before sending them off to wreak mayhem, Iraqi police believe."³¹⁶ In October 2005, Charles Clarke, the British Home Secretary, remarked that he wanted to treat terrorists "like victims of cult brainwashing" and that "anti-brainwashing techniques used to 'deprogramme' cult members could be employed . . ."³¹⁷

Whether the CIA's use of drugs in interrogation was successful is unknown because all records were destroyed in 1973.³¹⁸ A CIA document, dated in August 1954, indicated that LSD tests with voluntary and unwitting subjects evinced real potential of "eliciting true and accurate statements from subjects under its influence during interrogation."³¹⁹ Other scientific tests recognized that even small doses

312. MCCOY, *supra* note 59, at 29 (FOREIGN AND MILITARY INTELLIGENCE, *supra* note 260, at 392-93).

313. Cornwell, *supra* note 294.

314. STREATFEILD, *supra* note 141, at 65.

315. MCCOY, *supra* note 59, at 49-50 (citing *Project MKUltra*, *supra* note 279, at 51-52, 62 (1977)).

316. James Hider, *Iraqis Drugged, Brainwashed and Sent To Die for bin Laden*, SUNDAY TIMES, (UK), Mar. 22, 2004.

317. *Clarke Wants Terrorists Treated Like Victims of Cult Brainwashing*, THE TELEGRAPH, Oct. 2, 2005, <http://www.telegraph.co.uk/news/uknews/1499694/Clarke-wants-terrorists-treated-like-victims-of-cult-brainwashing.html>.

318. Keller, *supra* note 281, at 532.

319. STREATFEILD, *supra* note 141, at 68 (citing CIA, *supra* note 286).

of LSD induced subjects to lose control over senses and perceptions.³²⁰ By the mid-1950s, the CIA called LSD an “*anti-truth drug*: people on it were incoherent and completely out of control.”³²¹ Professor Jonathan Marks wrote that reports of interrogators administering truth serums and other psychotropic drugs to goad detainees to talk have indicated that interrogators “cannot ensure the accuracy or utility of the words spoken,”³²² which required interrogators who were “capable of deciphering fantasy from reality.”³²³

Government investigations revealed that CIA Director Helms deliberately destroyed over 150 individually-funded MKUltra research projects in 1973 immediately prior to news that the program would be declassified.³²⁴ Researchers later assembled more documentation on MKUltra by FOIA requests that cross-referenced financial files held by the Office of Technical Services, which were not destroyed because they were not listed under MKUltra.³²⁵ Other information emerged because of court cases.³²⁶ One of the most disturbing revelations involving CIA LSD testing (or use) is the case of Frank Olson.

4. *The Case of Frank Olson*

On November 28, 1953, and just days after he explained to his wife that he intended to leave government service, Dr. Frank Olson plunged to his death from the 10th floor of New York’s Statler Hotel.³²⁷ The government account, which remained the official explanation for the next twenty years, was that Olson had been a research scientist at the Special Operation Division’s biowarfare center at Fort Detrick, Maryland, and that he had either committed suicide or accidentally fallen.³²⁸ Robert

320. *Id.* at 72-75.

321. *Id.* at 89.

322. Marks, *supra* note 87, at 484.

323. STREATFEILD, *supra* note 141, at 48, 56 (citing File, CIA, Special Interrogations, (Feb. 12, 1951); File, CIA, BLUEBIRD Special Recommendations re: Personnel Requirements and Training, (Mar. 3, 1951)) (noting the CIA’s use of “crack” interrogation teams that travelled and conducted interrogations and operational experiments).

324. *Id.* at 64-65.

325. See MARKS, *supra* note 147.

326. MCCOY, *supra* note 59, at 45.

327. *Id.* at 30; STARRS & RAMSLAND, *supra* note 280, at 107, 109; Chris Floyd, *The Secret Sharers: The CIA, the Bush Gang and the Death of Frank Olson*, COUNTERPUNCH, (Aug. 28, 2002), <http://www.counterpunch.org/2002/08/28/the-cia-the-bush-gang-and-the-death-of-frank-olson/>; Kevin Dowling & Phillip Knightly, *The Olson File: A Secret that Could Destroy the CIA*, MAIL ON SUNDAY, Aug. 23, 1998.

328. MCCOY, *supra* note 59, at 30; see also Floyd, *supra* note 327.

Lashbrook, his colleague, stayed in the same hotel room and claimed he had been sleeping, but awoke when he heard crashing glass.³²⁹

During the Congressional hearings on scandalous intelligence operations in July 1975, the Olson family learned that Frank's death was "drug induced" from LSD, and announced at a press conference that they would sue the U.S. government.³³⁰ President Ford and CIA Director Colby agreed to pay \$750,000 and apologize to the Olson family.³³¹ Ford told the family that Frank Olson was a subject in a rogue-element CIA LSD-test on November 19, 1953, which involved LSD being "slipped into Olson's glass of Cointreau at Deep Creek Lodge."³³² The effects caused Olson to become depressed and have a mental breakdown that required hospitalization.³³³ Colby provided the family with 150-pages of redacted documents and said it was "among the most difficult assignments he had ever had."³³⁴ Dr. Gottlieb testified before Congress in 1977 and contended that the files, including those on Olson, had been destroyed.³³⁵

Eric Olson, Frank's son, was reluctant to accept the story and continued to interview people.³³⁶ He discovered that his father was not an ordinary civilian scientist but was working for the CIA on top secret brainwash and interrogation programs.³³⁷ In 1997, Eric learned that a CIA Assassination Manual from 1953 stated that "[t]he most efficient accident, in simple assassinations, is a fall of seventy-five feet or more onto a hard surface. Elevator shafts, stairwells, unscreened windows and bridges will serve . . . It will usually be necessary to stun or drug the subject before dropping him."³³⁸ Moreover, Dr. Gottlieb had been "reprimanded for the handling of the Olson incident, [and] had been involved in CIA assassination plots"³³⁹

329. STARRS & RAMSLAND, *supra* note 280, at 106; *see also* Floyd, *supra* note 327.

330. *See generally* MCCOY, *supra* note 59, at 30.

331. *Id.*; H.P. Albarelli Jr., *The Mysterious Death of Frank Olson*, CRIME MAGAZINE, Dec. 14, 2002, *available at* <http://crimemagazine.com/part-one-mysterious-death-cia-scientist-frank-olson>. *See also* Floyd, *supra* note 327. Cheney told Rumsfeld in a July 11, 1975 memorandum, "It might be necessary to disclose highly classified national security information" during the trial, but that "had to be avoided at all costs." STARRS & RAMSLAND, *supra* note 280, at 109-10, 116; Floyd, *supra* note 327.

332. STARRS & RAMSLAND, *supra* note 280, at 109.

333. *Id.* at 108; Floyd, *supra* note 327.

334. STARRS & RAMSLAND, *supra* note 280, at 110-11, 146.

335. *Id.* at 110, 146.

336. *Id.* at 109, 114-15.

337. *Id.* at 107, 114-15; Floyd, *supra* note 327.

338. Floyd, *supra* note 327; *see also* STARRS & RAMSLAND, *supra* note 280, at 111, 148; Floyd, *supra* note 327.

339. STARRS & RAMSLAND, *supra* note 280, at 111.

James E. Starrs, Professor of Law and Forensic Sciences at George Washington University, worked with the Olson family and provided a detailed account of his investigation in the book *A Voice for the Dead: A Forensic Investigator's Pursuit of the Truth in the Grave* (2005).³⁴⁰ Starrs explained that "Project Bluebird," renamed ARTICHOKE, "involved extreme methods of interrogation and an attempt to develop a way to produce complete amnesia in questioned subjects or in agents who had seen too much and could no longer be trusted."³⁴¹ Frank Olson's case involved anomalies,³⁴² and discrepant accounts of the crime scene, including that the police report and hotel staff indicated that there was no broken window in the room and that Lashbrook's actions were suspicious.³⁴³ No autopsy had been performed and modern science could contribute new insights.³⁴⁴ Starrs assembled a team of fifteen eminent scientists, pathologists and medical experts and exhumed Frank Olson's body on June 2, 1994.³⁴⁵ The body was "immaculately well-preserved," and had "no lacerations" or "evidence of such injuries" that would exist with broken glass.³⁴⁶ The body had two expected fracture injuries from

340. *Id.* at 105-53.

341. *Id.* at 111.

342. CIA reports stated that Olson was a family man devoted to his children, and co-workers and physicians explained that Olson always had a positive "state of mind," but after his death Dr. Willis Gibbons, a high-level official in the CIA, claimed "Olson had a history of mental disturbances." *Id.* at 123, 131. Dr. Gibson, a psychiatrist, claimed he had a clear memory of the events surrounding Olson's death and had spoken to Lashbrook hours before the death and that Lashbrook "insisted that Olson was then no danger to himself or to others" and did not need to be hospitalized. *Id.* at 145.

343. In 1993, Starrs contacted the Statler Hotel Night manager who accompanied the police to the room and found Lashbrook in the bathroom befuddled and stating that he awoke "because of the sound of 'a crash of glass,'" but the window was closed and not broken, as documented in the police report and in the Church Commission report. *Id.* at 114, 130. Lashbrook told Starrs over the phone that he awoke because he heard the window shade spinning, but he could not remember if glass broke at all. STARRS & RAMSLAND, *supra* note 280, at 142. Dr. Gibson stated that Lashbrook told him that he awoke "to find 'Olson standing in the middle of the hotel room. He had tried to speak with Olson, but Olson had run straight toward the window, through it, and to his death.'" *Id.* at 146. The hotel phone operator overheard Lashbrook call someone after the death and said, "Well, he's gone," and the other unemotional voice responded, "That's too bad." *Id.* at 130.

344. *Id.* at 106, 117, 131.

345. STARRS & RAMSLAND, *supra* note 280, at 199-20.

346. *Id.* at 118-19, 121-22; (stating that the team studied "bio-engineering aspects of a fall from that height, an analysis of the causal features of fractures resulting from the fall, a toxicological analysis of bodily and hair for therapeutic and abused drugs (whether defined as 'controlled substances' or not), the use of the computer to animate a re-enactment scenario of the event, and to provide an identification of the remains by a computerized skull superimposition.").

the fall—on the heel and shoulder—but also an unexplained sub-galeal hematoma injury with hemorrhage over the left eye that could not have been caused by the fall.³⁴⁷

The Olson criminal case was reopened and prosecutors Stephen Saracco and Daniel Bibb began contacting key witnesses, but they encountered problems with gathering evidence.³⁴⁸ First, days after prosecutors requested to interview former CIA Director Colby, Colby mysteriously disappeared from his home and his body was found on Chesapeake Bay Island with the death assessed as a drowning accident.³⁴⁹ Second, prosecutors interviewed Lt. Colonel Vincent Ruwet, Olson's immediate supervisor, and found him evasive at the first interview and he suffered a fatal heart attack prior to the second scheduled interview.³⁵⁰ Third, Lashbrook refused a subpoena, would only talk in the presence of an attorney, and stonewalled.³⁵¹ Fourth, Gottlieb was losing successive cases after being sued by hundreds of families who had been involuntarily drugged with LSD, which purportedly made him "mentally unstable," and he died on March 7, 1999 of a heart attack.³⁵² Fifth, prosecutors sought to interview the CIA officer who conducted the initial Olson investigation, but before they could interview him he fell from a Berlin hotel room and died of head injuries.³⁵³

With key witnesses deceased, in August 2002, Eric wrote a 23-page statement to announce that the family was giving up but clearly believed that his father had been murdered.³⁵⁴ Upon the suggestion that the CIA had murdered Frank Olson, a CIA spokesperson retorted, "that's absolutely untrue and totally without foundation."³⁵⁵ Professor Starrs concluded,

[P]ersons and agencies most closely associated with . . . [the homicide were dishonest and evasive, which indicates] involvement more sinister than mere unconcern, arrogance, or even negligence. The confluence of scientific gleanings and

347. *Id.* at 106, 125-26, 134.

348. *Id.* at 147.

349. *Id.*

350. *Id.*

351. STARRS & RAMSLAND, *supra* note 280, at 147.

352. *Id.*

353. *Id.* at 147-48.

354. *Id.* at 148.

355. *Family Closes Door on Cold War Scientist's Mysterious Death in 1953*, COURT TV NEWS (Aug. 9, 2002), <http://nucnews.net/nucnews/2002nn/0208nn/020809nn.htm>.

investigative fact points unerringly to the death of Frank Olson as being a homicide: deft, deliberate, and diabolical.³⁵⁶

While there were many other cases,³⁵⁷ a similar scandal involving involuntary psychedelic drug compounds arose a few months before Olson's death in New York. In January 1953, Harold Blauer, a tennis professional in excellent condition, checked himself into New York Psychiatric Institute for depression, but fell into a coma and died.³⁵⁸ After LSD experiments were revealed in congressional investigations in 1975 and that Blauer was a subject, the family initiated a wrongful death action.³⁵⁹ The case remained in U.S. courts for over a decade, and Judge Motley held that the government was involved in committing cover-ups, providing false statements, protracting litigation, and fabricating false documents.³⁶⁰ Blauer's doctors defended by stating that they were fulfilling the conditions of the U.S. Army's research sponsorship by administering an unidentified chemical compound.³⁶¹ In rendering the final judgment in May of 1987, Judge Motley stated that Mr. Blauer was "a guinea pig in an [LSD] experiment," and "rather than admit its role in Blauer's death, the Government [U.S. Army] covered up its involvement in the affair, thus this opinion is issued today rather than in the early 1950's when the death occurred."³⁶²

5. Post-9/11 Interrogations

Shortly after 9/11, the Bush Administration openly posited that pharmaceutical compounds might be used in interrogations, and accusations arose of detainees being drugged from the time that prisoners were initially transferred to Guantanamo in January 2002.³⁶³ In April

356. STARRS & RAMSLAND, *supra* note 280, at 152-53.

357. Odesho, *supra* note 277, at 216-21 (indicating research continued from the 1940s until the 1960s).

358. STARRS & RAMSLAND, *supra* note 280, at 111-12.

359. Arnold H. Lubasch, *Health*, N.Y. TIMES (May 6, 1987), <http://www.nytimes.com/1987/05/06/nyregion/388687.html>.

360. *Barrett v. United States*, 660 F. Supp. 1291, 1294 (S.D.N.Y. 1987); *Barret v. State*, 378 N.Y.S.2d 946 (1976); *Barrett v. Hoffman*, 521 F. Supp. 307 (S.D.N.Y. 1981), *rev'd*, 689 F.2d 324, *cert. denied*, 462 U.S. 1131, *remanded* 622 F. Supp. 574, *aff'd*, 798 F.2d 565; *Barrett v. United States*, 660 F. Supp. 1291 (S.D.N.Y. 1987); *Barrett v. United States*, 668 F. Supp. 339 (S.D.N.Y. 1987), *aff'd*, 853 F.2d 124, *cert. denied*, 488 U.S. 1041.

361. STREATFEILD, *supra* note 141, at 333.

362. *Barrett*, 660 F. Supp. at 1294.

363. Gregory M. Huckabee, *The Politicizing of Military Law – Fruit of the Poisonous Tree*, 45 GONZ. L. REV. 611, 657 (2010) (stating drug use is permissible "providing their

2002, William Webster, former FBI director (1978-87) and CIA director (1987-91), contended that in order to boost the effectiveness of interrogations, "the United States should consider administering 'truth drugs' to uncooperative al-Qaeda and Taliban captives."³⁶⁴ Administration legal advisor John Yoo's memos addressed the use of mind altering drugs in interrogation and called them legal as long as the level did not "disrupt profoundly the senses or personality."³⁶⁵ The Convention Against Torture does state that administering drugs would be torture if "prolonged mental harm" will be caused by the administration or threatened application of "mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality"³⁶⁶

Saudi Arabian Abdel al-Nusairi was held at Guantanamo Bay for three years and later recounted how he had been repeatedly injected with drugs concomitant with interrogations.³⁶⁷ He remembers stating that he was "completely gone" and expounded: "Let me go. I want to sleep. If it takes saying I'm a member of al-Qaeda, I will."³⁶⁸ As of April, 2008, from accounts contained in interviews and court documents, at least two dozen former and current detainees alleged that they had been drugged.³⁶⁹ Alberto J. Mora, a former Navy general counsel, remarked: "They knew they were being injected with something, and it is clear from all accounts that some suffered severe psychological damage."³⁷⁰

use or procedures did not rise to the level of disrupting profoundly the sense or personality"); Keller, *supra* note 281, at 526-27; AMNESTY INT'L, THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS WAR ON TERROR DETENTIONS CONTINUE 16 (2003); Jeff Stein, *Evidence Grows of U.S. Drug Use on Detainees*, INFO. CLEARING HOUSE (Apr. 4, 2008), <http://www.informationclearinghouse.info/article19680.htm>; Mark Bowden, *The Dark Art of Interrogation*, ATL. MONTHLY, Oct. 2003, at 51; Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, <http://articleswww.commondreams.org/headlines.shtml?/headlines01/1021-06.htm>; http://articles.sun-sentinel.com/2001-10-23/news/0110230051_1_fbi-official-al-qaida-box-cutters.

364. Johnson & Willing, *supra* note 306.

365. Memorandum from the Office of the Deputy Assistant Attorney Gen., U.S. Dept. of Justice, for William J. Haynes II, Gen. Counsel of the Dept. of Def. 42-43 (Mar. 14, 2003).

366. Keller, *supra* note 280, at 583-84.

367. Joby Warrick, *Detainees Allege Being Drugged, Questioned: US Denies Using Injections for Coercion*, WASH. POST, Apr. 22, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/04/21/AR2008042103399_pf.html.

368. *Id.*

369. *Id.*

370. *Id.*; Stein, *supra* note 363.

Pentagon and intelligence agencies denied that interrogations drugs were introduced, but asserted that “sedatives” were occasionally administered.³⁷¹

In April 2008, Leonard Rubenstein, president of Physicians for Human Rights, remarked: “The use of drugs as a form of restraint of prisoners is both unlawful and unethical. These allegations demand a full inquiry by Congress and the Department of Justice.”³⁷² It is not evident that pharmaceutical compounds are substantially effective in revealing truth,³⁷³ and drugs assuredly did not uncover worldwide terror networks or lead to large-scale arrests and convictions, nor did they verify that there were “sleeper cells” that would strike U.S. interests.

B. The Kubark Interrogation Manual and Medical Science

1. A Standard Approach Commencing with Sensory Deprivation

After more than a decade of research and experimentation, the CIA compiled its findings into the *Kubark Counterintelligence Interrogation* manual (1963), which served as the core text for a premier course at CIA headquarters for over a decade.³⁷⁴ *Kubark* contains a thirteen-page bibliography of medical and scientific publications,³⁷⁵ and affirms that the methods are “based largely upon the published results of extensive research, including scientific inquiries conducted by specialists in closely related subjects” so to bring “pertinent, modern knowledge to bear” on interrogation.³⁷⁶ Some of the most controversial operational applications, such as the use of medical and chemical compounds, electric shock methods, and physical abuse, require prior headquarters approval,³⁷⁷ but generally, the manual is devoted to delineating a methodological approach to psychological interrogation. The bifurcation in techniques seem to track the milder forms of interrogation that employed psychiatrists, polygraph experts, and hypnotists to discover effective interrogation processes, and the more extreme “offensive uses of

371. Warrick, *supra* note 367.

372. *Id.*

373. David Brown, *Some Believe ‘Truth Serums’ Will Come Back*, WASH. POST, Nov. 20, 2006, at A08 (“[T]here is no pharmaceutical compound today whose proven effect is the consistent or predictable enhancement of truth-telling.”).

374. Former CIA agent Bill Wagner explained that there was a three-week “premier course” on *Kubark* methods for a decade at CIA headquarters, but a high percentage of agents “lost their stomachs for it.” MCCOY, *supra* note 59, at 52-53.

375. Marks, *supra* note 87, at 484.

376. KUBARK, *supra* note 148, at 1-2.

377. *Id.* at 8.

unconventional interrogation techniques, including hypnosis and drugs."³⁷⁸

CIA-sponsored research findings are incorporated in theory and application in *Kubark*. As conveyed from a 1957 study at Harvard University, sensory deprivation is the foundation of psychological interrogation because privation of sensory stimuli begets stress that can become unendurable, leads subjects to lose touch with reality, hallucinate, and become mentally disturbed or ill, which leads the subject's behavior to conform due to the growing need for social and physical stimuli.³⁷⁹ Stress, irritability, and depression manifest when people are deprived of information, and the brain becomes disorganized and incapable of focusing on ordinary activities.³⁸⁰

To achieve sensory deprivation, *Kubark* recommends that interrogators sound proof the detainee's cell, eliminate light and human interaction, use hooding, and eliminate odors.³⁸¹ Additional methods of manipulating cognition include changing clocks, feeding captives at odd times or not at all, denying sleep to cause mental fatigue, and inducing disorientation between day and night.³⁸² Interrogation operatives should engage in "unpatterned" and "nonsensical questioning" and cause befuddlement by "rewarding non-cooperation" and "ignoring half-hearted attempts to cooperate."³⁸³ Excessive confusion "obliterate[s] the familiar," and can also assault personal identity and become "mentally intolerable."³⁸⁴

378. MCCOY, *supra* note 59, at 26-27 (citing FOREIGN AND MILITARY INTELLIGENCE, *supra* note 260, at 387-88; WEINSTEIN, *supra* note 284, at 128-29). Other preceding documents described research of more invasive forms of thought-control, causing brain damage, and using "sensory stimulation, hypnosis, 'black psychiatry,' Pavlovian conditioning, 'Brainwashing' or any other methods having pertinence for such procedures as interrogation, subversion or seduction." STREATFEILD, *supra* note 141, at 26, 47 (citing File, CIA, Discovering Means of Conditioning Personnel (Goals of Project BLUEBIRD): Behavioral Drugs, (Jan. 1, 1975)).

379. MCCOY, *supra* note 59, at 40.

380. STREATFEILD, *supra* note 141, at 115 (citing THE MANIPULATION OF HUMAN BEHAVIOR, *supra* note 155) (research by Dr. Lawrence Hinkle from the mid-1950s).

381. MCCOY, *supra* note 59, at 51 (citing KUBARK, *supra* note 148, at 88, 90, 94).

382. *Id.*

383. *Id.* at 90 (citing CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL (1983), available at <http://www.scribd.com/doc/80161998/Human-Resource-Exploitation-Training-Manual-1983>).

384. *Id.* at 51 (citing KUBARK, *supra* note 148, at 1-2, 41, 76-78).

2. Self-Inflicted Pain

Kubark asserts that imposing self-inflicted pain is more effective than inflicting physical abuse to exacerbate sensory deprivation.³⁸⁵ *Kubark* states that “whereas pain inflicted on a person from outside himself may actually focus or intensify the will to resist, his resistance is likelier to be sapped by pain which he seems to inflict on himself.”³⁸⁶ Forcing detainees to remain in “stress positions” for prolonged durations can make the victim feel responsible because the detainee’s muscles are creating the pain.³⁸⁷ With physical torture, victims may suffer broken bones, neurological and psychological damage, brain damage, or even death,³⁸⁸ and this perception can be used to stimulate adverse emotional processes to intensify the impact of self-inflicted pain. *Kubark* explains that “the threat to inflict pain . . . can trigger fears more damaging than the immediate sensation of pain” and the “threat is basically a means for . . . inducing fear in the subject.”³⁸⁹ Dr. Joost Meerloo explained that it is the anxiety and dreaded anticipation of the unknown that causes severe changes in mental functioning.³⁹⁰ *Kubark* states that this process not only “destroys his capacity to resist,” but also results in “a loss of autonomy, [and] a reversion to an earlier behavioral level.”³⁹¹ The torture may shatter the victim’s former reality and “prior schemas of [himself] and the world.”³⁹²

Emotional pain can be magnified by trapping detainees in narrow spaces, creating unpredictability and feelings of indefinite captivity, and usurping all power over the victim’s life to engender an introspection of helplessness.³⁹³ If interrogators incriminate the captive with unfounded

385. *Id.* at 51-52 (citing KUBARK, *supra* note 148, at 88, 90, 94).

386. *Id.* at 51-52, 91 (citing KUBARK, *supra* note 148, at 88, 90, 94) (the “immediate source of pain is not the interrogator but the victim himself.”); CIA, *supra* note 383 (“[i]ntense pain is quite likely to produce false confessions, fabricated to avoid additional punishment,” which “results in a time -consuming delay while [an] investigation is conducted and the admissions are proven untrue.”); *Psychological Torture, CIA-Style*, HARPER’S MAG, Apr. 1997, at 23-24.

387. MCCOY, *supra* note 59, at 55; *Ireland v. The United Kingdom*, No. 5310/17, EUR. CT. H. R., 17, ¶ 96-97 (1978), available at <http://www.worldlii.org/eu/cases/ECHR/1978/1.html>.

388. Bell, *supra* note 11, at 358.

389. MCCOY, *supra* note 59, at 52, 91 (citing CIA, *supra* note 383); GREG GRANDIN, EMPIRE’S WORKSHOP 108 (2006); Scheppele, *supra* note 67, at 336; Louis Michael Seidman, *Torture’s Truth*, 72 CHI. L. REV. 881, 907 (2005) (“It is not the pain itself that is the essence of torture’s evil.”).

390. WINN, *supra* note 132, at 18.

391. MCCOY, *supra* note 59, at 90 (citing CIA, *supra* note 383).

392. *Id.* at 10.

393. *Id.*

criminal charges or lies, dispense fabricated news, and unleash deceptions such as “mock executions” of other inmates or family members, detainees ruminate endlessly on losing a loved one and their own fate, question reality, and develop unendurable emotions of destitution.³⁹⁴ At Abu Ghraib, approaches involved “forcing a father to watch the mock execution of his fourteen year old son.”³⁹⁵

3. *Kubark Methods after 9/11 and Bush Administration Directives*

a. Military Chain of Command

After 9/11, sensory deprivation was routinely used by U.S. interrogators in Afghanistan, Iraq, and elsewhere,³⁹⁶ and the methods drew on “*Kubark*-style forms of psychological coercion”³⁹⁷ that were manifestly “designed to manipulate the detainee’s emotions and weaknesses to gain his willing cooperation.”³⁹⁸ Thus, when top White House, CIA, and Pentagon officials were “outraged,” “incensed,” and “shocked” by the brutality and lack of respect from low-level reservist Military Police [MPs] who were supposedly acting outside the scope of their directives when they detailed abuse in photos and videos,³⁹⁹ were those same officials not privy to the *Kubark* manual and the historical use of similar methods? Should it really be astonishing to view humiliated, emotionally-distraught, blindfolded, and naked Iraqis at Abu Ghraib piled on each other in stress positions? The scenes did not necessarily depict physical force, but they did exhibit sensory deprivation and self-inflicted pain by forcing captives to endure stress positions that would cause detainees to have muscle exertion and pass out.⁴⁰⁰ Some authorities may not deem this torture, but the mental and physical intentions were akin to what CIA manual sought to produce in detainees.

According to the Major General Taguba investigation, “interrogators actively requested that MP guards set physical and mental conditions for

394. *Id.*

395. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 399 (2006).

396. AMNESTY INT’L, THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE 16 (2003).

397. John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1055 (2009).

398. DEP’T OF DEF., *supra* note 96, at 62.

399. MCCOY, *supra* note 59, at 137, 156 (citing TAGUBA REPORT, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 7-8, 15 (2004)).

400. Eric Schmitt, *3 in 82nd Airborne Say Beating Iraqi Prisoners Was Routine*, N.Y. TIMES, Sept. 24, 2005, at A1 (noting that this was a standard process called “smoking the detainees.”).

favorable . . . MP interrogations.”⁴⁰¹ Intelligence operatives instructed MPs at Abu Ghraib to have detainees broken down before interrogations and they were complemented.⁴⁰² Whether interrogators explicitly directed MPs to strip, blindfold, and pile detainees, or whether MPs took the initiative in being inventive should not be reason to absolve superiors from responsibility. In December of 2002, Dr. Michael Gelles, the chief psychologist at the Naval Criminal Investigative Service, explained that “abusive techniques” and “psychology procedures” can uncontrollably drift into severe abuse.⁴⁰³ The June 2004 International Red Cross (IRC) investigation referenced the abuses in the Taguba report, and explained that these previously covert CIA interrogation procedures were clearly “torture,” but were now habitually being used as standard approaches in detention centers worldwide.⁴⁰⁴

Top officials provided a succession of directives for authorized interrogation methods to the military chain of command.⁴⁰⁵ In October of 2002, Joint Task Force 170 imparted the Joint Chiefs of Staff and SOUTHCOM with proposals that virtually tracked *Kubark* methods.⁴⁰⁶ There were three categories with progressing intensity. Category I authorized interrogators to stimulate an uncomfortable environment by yelling and employing deception to create stress.⁴⁰⁷ Category II permitted interrogators to use stress positions, produce falsified documents, quarantine captives in solitary confinement for up to thirty days, restrict breathing, induce sensory deprivation, and invoke phobias.⁴⁰⁸ Category III authorized interrogators to threaten to kill members of a captive’s family, expose inmates to harshly cold temperatures and water, engage in daylong interrogations, and induce perceptions of drowning or

401. IN THE NAME OF DEMOCRACY, *supra* note 66, at 96, 99; TAGUBA REPORT, *supra* note 399, at 12.

402. REED BRODY, HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 34 (2004), available at <http://www.hrw.org/sites/default/files/reports/usa0604.pdf>.

403. MCCOY, *supra* note 59, at 128.

404. *Id.*; See generally, RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT, AND INTERROGATION (2004).

405. Wallach, *supra* note 96, at 595-96.

406. *Id.* at 581.

407. *Id.* at 582; Memorandum from William J. Haynes II, Gen. Counsel to Sec’y, Dept. of Def. (Subject: Counter-Resistance Techniques, Nov. 27, 2002)); Memorandum, Dept. of Def., Special Defense Department Briefing (July 7, 2005).

408. Wallach, *supra* note 96, at 582.

suffocation.⁴⁰⁹ In December 2002, Defense Secretary Rumsfeld approved Category I and II, and some methods in Category III.⁴¹⁰

Because some officials contended that detainees frequently resisted approved interrogation methods, a Defense Working Group was established early in March of 2003, and Rumsfeld authorized another dozen interrogation methods, including implementing "environmental manipulation," altering sleep rhythms from night to day, leaving detainees naked in dark isolation for up to thirty days, applying harsh heat and cold, withholding food, hooding for several days straight, and forcing detainees in "stress positions" to "subject detainees to rising levels of pain."⁴¹¹ Directives progressed down the chain of command.⁴¹² On September 14, 2003, Lt. Gen. Ricardo Sanchez authorized the use of twenty-nine interrogation methods, including isolation, stress positions, threats with dogs, and sleep and sensory deprivation, only to revoke the authorization several weeks later.⁴¹³ One of the approaches used at Guantánamo Bay, Afghanistan, and then at Abu Ghraib was to use dogs to intimidate inmates,⁴¹⁴ and Rumsfeld approved this approach in November of 2002 to generate fear and individual phobias.⁴¹⁵

These approaches were substantially consistent with the theory, premises, and practice underlying long-established CIA methods.⁴¹⁶ For example, making threats to instill fear and inflict emotional pain, and

409. MCCOY, *supra* note 59, at 127; Wallach, *supra* note 96, at 583; John Barry, Michael Isikoff & Michael Hirsh, *The Roots of Torture*, NEWSWEEK, May 19, 2004 at 31-33.

410. Wallach, *supra* note 96, at 583, 593-94; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 840 (2005). In November 2002, the Bush White House approved of the use of sensory deprivation, stress positions, phobias, dogs, psychological trickery, and threat scenarios against the detainee and/or his family. Memorandum re: Counter-Resistance Techniques, from William J. Haynes II, Gen. Counsel, to Sec'y of Def. (Nov. 27, 2002). Attachments include Memorandum re: Legal Brief on Proposed Counter-Resistance Strategies, from Lieutenant Colonel Diane E. Beaver, Staff Judge Advocate, U.S. Army for, to Commander, Joint Task Force 170 (Oct. 11, 2002); Memorandum re: Request for Approval of Counter-Resistance Strategies, from Lieutenant Colonel Jerald Phifer, Direct, J2, U.S. Army, for Commander, Joint Task Force 170 (Oct. 11, 2002).

411. DEP'T OF DEF., *supra* note 96, at 62-65.

412. Wallach, *supra* note 96, at 598.

413. Fay, *supra* note 127, at 10, 15-16, 25-26.

414. Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 340 (2006).

415. Pearlstein, *supra* note 58, at 1263-65 (citing LT. GEN. MARK SCHMIDT & BRIG. GEN. JOHN FURLOW, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AS GUANTANAMO BAY, CUBA DETENTION FACILITY 14 (2005)).

416. MCCOY, *supra* note 59, at 134, 137.

depriving detainees of food and sleep are detailed in the Kubark manual.⁴¹⁷ Dispensing humiliation, isolating with sensory deprivation for long periods, removing clothing, applying stress positions, and depriving sleep are all CIA approaches and were customarily employed at all U.S. facilities.⁴¹⁸ For example, at Guantánamo Bay, investigations revealed that Pentagon medical professionals designed a “special interrogation plan” of sexual humiliation for a detainee.⁴¹⁹ Interrogators also “trained” and instructed this completely naked detainee “to growl, bark, and show his teeth” like a dog and dragged him around by chains.⁴²⁰ Iraqi prisoners explained that they were treated like animals, were forced to bark and walk like dogs on their hands and knees.⁴²¹ Another detainee complained of “stress positions,” sleep deprivation, and 160 days of isolation and sensory deprivation under extremely cold conditions, which so significantly reduced his heart rate that he was hospitalized twice.⁴²² He was interrogated for forty-eight days.⁴²³ Similarly, the U.S. Army interrogation school claims to fall short of “torture” when it trains operatives “to prey on a prisoner’s ethnic stereotypes, sexual urges and religious prejudices, his fear for his family’s safety, or his resentment of his fellows.”⁴²⁴ While it is taboo to defend racism in the U.S., prejudice against Arabs is ‘rampant’ and often considered legitimate to outwardly defend for supposedly rational reasons even in intellectual circles.”⁴²⁵

The Third Geneva Convention prohibits holding detainees in solitary confinement,⁴²⁶ and in October 2003, Amnesty International cited abuses

417. Parry, *supra* note 397, at 1009-1010.

418. MCCOY, *supra* note 59, at 155 (citing Fay, *supra* note 127, at 29).

419. *Id.* at 130 (citing DEP’T OF DEF., ARMY REGULATION 15-6: FINAL REPORT: INVESTIGATION INTO FBI ALLEGATION OF DETAINEE ABUSE AT GUANTÁNAMO BAY, CUBA DETENTION FACILITY 12, 14-21 (2005)) (amended June 9, 2005). *Hearing on Guantánamo Bay Detainee Treatment Before the S. Armed Servs. Comm.* 13-17, 109th Cong. (2005) (having a female interrogator wipe red ink on his naked body and say that she was menstruating, taunting him with his claimed “homosexual tendencies . . . that other detainees knew” about, forcing him to “wear a bra and thong . . . on his head,” and telling him his “mother and sister were whores.”).

420. MCCOY, *supra* note 59, at 155.

421. MARK DANNER, *TORTURE AND TRUTH* 228, 237-39 (2005).

422. MCCOY, *supra* note 59, at 130.

423. *Id.*

424. J. Trevor Ulbrick, *Tortured Logic: The (Il)legality of the United States Interrogation Practices in the War on Terror*, 4 NW. U. J. INT’L HUM. RTS. 210 (2005).

425. Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 418 (2005).

426. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 21, 25, Aug. 12, 1949, 6 U.S.T. 3516, 3518, 3520.

that were crimes involving “cruel, inhuman or degrading treatment”⁴²⁷ and explicitly warned the White House.⁴²⁸ In May 2006, the UN Committee Against Torture categorically rejected the Bush Administration argument that a so-called “war on terrorism” permitted suspending the Torture Convention, by retorting that the “Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction.”⁴²⁹ Moreover, because the justification for attacking Iraq — alleged possession of WMDs, was entirely false, it is arduous to conceive of how thousands of people could be legitimately rounded up and detained when, by definition, they could not have been guilty of anything. Likewise, the Geneva Convention expressly prohibits any interrogations of POWs to obtain intelligence.⁴³⁰

b. CIA Authorizations

CIA Director Tenet stated that it was difficult to obtain “clear guidance” from the White House on how far interrogations should go.⁴³¹ CIA spokesman Bill Harlow remarked that the “intelligence community insists that its officers not exceed the very explicit authorities granted.”⁴³² Restrictions may have been inconsequential. A Justice Department memo opined that interrogators could not be criminally responsible for the consequence of any interrogation method unless the interrogator intended to kill or do permanent grave bodily harm to the captive.⁴³³

427. *United States of America: We Don't Torture People in America*, AMNESTY INT'L (Oct. 20, 2003), <http://www.amnesty.org/en/library/asset/AMR51/128/2003/en/7757ffcb-d67b-11dd-ab95-a13b602c0642/amr511282003en.html>.

428. *An Open Letter to President George W. Bush on the Question of Torture and Cruel, Inhuman or Degrading Treatment*, AMNESTY INT'L, (May 7, 2004), <http://www.amnesty.nl/nieuwsportaal/pers/open-letter-president-george-w-bush-question-torture-and-cruel-inhuman-or-degradi> (“[T]he United Nations Committee against Torture . . . expressly held that restraining detainees in very painful positions, hooding, threats, and prolonged sleep deprivation are methods of interrogation which violate the prohibition on torture and cruel, inhuman or degrading treatment.”); *Concluding Observations of the Comm. Against Torture: Israel*, 18th Sess., paras. 256-57, U.N. Doc. A/52/44 (1997).

429. *Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*, ¶ 14, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006).

430. Geneva Convention, *supra* note 426.

431. Seymour M. Hersh, *The General's Report*, NEW YORKER, June 17, 2007.

432. *Id.*

433. Mary Ellen O'Connell, *Responses to the Ten Questions*, 36 WM. MITCHELL L. REV. 5127, 5136 (2010) (explaining legal advisors “went to a completely unrelated document, a U.S. health care statute, found a provision that they liked, and from this statute they constructed a definition of torture that limited torture to actions inflicting the pain of ‘organ failure or death.’”).

When former detainees sought to detail abuse in court, the Bush Administration argued that “alternative interrogation methods” could not be revealed under national security because doing so “could reasonably be expected to cause extremely grave damage” to the country⁴³⁴ and infringe on presidential power.⁴³⁵ Another explanation was that captives might learn to resist the methods.⁴³⁶ Militants could have downloaded the declassified *Kubark* interrogation manual.

Quite astounding is the way in which the CIA occasionally paraded along in the charade of not previously being aware of harsh interrogation procedures.⁴³⁷ Shortly after 9/11, the media described that the CIA needed to consult agency psychiatrists and foreign governments to learn effective interrogation techniques.⁴³⁸ In 2007, the *New York Times* referenced the period following 9/11: “With virtually no experience in interrogations, the C.I.A. had constructed its program in a few harried months by consulting Egyptian and Saudi intelligence officials and copying Soviet interrogation methods.”⁴³⁹ This rendition is jaw-dropping. *Kubark* was produced in 1963, the CIA wrote the methodologically-akin *Human Resource Exploitation Training Manual* in 1983, and interrogators conducted the techniques through the U.S. Army Mobile Training Teams in Central America during the 1970s and 1980s.⁴⁴⁰ As for the extraordinary rendition process in which the CIA kidnapped individuals and delivered them to governments suspected of using torture, if their own methods were ineffective, and more intense approaches were supposedly necessary, then it seems probable that rendering officers knew that detainees would be subject to torture, and that there would likely be violation of international and U.S. law.⁴⁴¹

434. Respondents’ Memorandum in Opposition to Petitioners’ Motion for Emergency Access to Counsel and Entry of Amended Protective Order, *Khan v. Bush*, No. 06-CV-1690 (D.D.C. Oct. 26, 2006); Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons*, WASH. POST, Nov. 4, 2006, at A1.

435. Memorandum in Support of the United States’ Assertion of State Secrets Privilege at 2-3, *Arar v. Ashcroft*, No. 04-CV-240-DGT-VVP (E.D.N.Y. Aug. 11, 2005).

436. Respondents’ Memorandum in Opposition to Petitioners’ Motion for Emergency Access to Counsel and Entry of Amended Protective Order, *Khan v. Bush*, No. 06-CV-1690 (D.D.C. Oct. 26, 2006).

437. Johnson, *supra* note 4.

438. *Id.*

439. Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all>.

440. McCoy, *supra* note 59, at 11.

441. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-822 (1999) (“United states [officials shall] not . . . expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are

4. Medical Conditions

Psychological interrogation dismantles the detainee's voluntary and normal mental processes by eliminating sensory stimulation, and disorganizing personality, experiences, and memory.⁴⁴² Imagine placing a person in sensory isolation for several days or weeks, taking food and water, and imposing conditions of fear, stress, and peril. The lack of nourishment to the brain, dietary imbalance, stress, and sensory deprivation could shock the body and cause nerve damage.⁴⁴³ Recall that, as part of MKUltra, congruent research findings used to interrogate and obtain information were also studied for what the CIA termed "brainwashing." The CIA was not describing a master pulling the strings of a helpless human puppet, but referring to processes that could reduce voluntary action and permit coercion.⁴⁴⁴ If an interrogator imposes similar conditions, the operative may force answers based on what the interrogator suggests or wants to be true. Rather than goading a detainee to dispense useful intelligence, *Kubark* mechanisms could also produce false confessions to end suffering,⁴⁴⁵ and cause tremendous harm.

Torture victims can become more isolated and unable to trust family, friends, and associates.⁴⁴⁶ Torture can devastate a victim's personality and traumatize long after the abuse ends.⁴⁴⁷ Therapists Glenn Randall and Ellen Lutz explain that "learned helplessness," or the loss of power over the most basic decisions, is one of the "most devastating" human rights abuses because a victim can lose the ability to cope with normal life activities, and may always confront persistent distress as a generalized harm.⁴⁴⁸

substantial grounds for believing the person would be in danger of being subject to torture . . .").

442. Costanzo, *supra* note 6, at 183, 190.

443. Bell, *supra* note 11, at 358 ("Studies of torture victims show that other physically coercive methods, even those that fall in the torture 'lite' category, may cause lasting neurological damage").

444. See *supra* Parts III(B)(2), III(B)(5), IV(A)(1).

445. Foley, *supra* note 101, at 1060.

446. Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295, 316 (2005).

447. MCCOY, *supra* note 59, at 99. In 1972, Amnesty International urged a group of Danish doctors to examine Chilean and Greek refugees for the "after-effects of torture" and found that nearly 70% of the 200 victims examined still had "mental symptoms" many years after the torture. *Id.* Dr. Inge Genefke, one of the research physicians, explained that "the private hell stays with you through your life if it's not treated." *Id.*

448. GLENN R. RANDALL & ELLEN L. LUTZ, *SERVING SURVIVORS OF TORTURE* 41-42 (1991).

These are a few possible repercussions of interrogation methods that were approved by top officials and deemed legitimate by legal advisers. Medical and health groups condemned the torture memos and the use of psychological interrogation.⁴⁴⁹ In April of 2005, Physicians for Human Rights stated that since “2002, the United States has been engaged in systematic psychological torture” with “devastating health consequences;” “detainees released from Guantánamo . . . ‘suffer from depression, thoughts of suicide and nightmares, memory loss, emotional problems, and . . . have difficulties maintaining relationships and employment.’”⁴⁵⁰

As the agency did during the Cold War,⁴⁵¹ the CIA and Pentagon acknowledged employing medical professionals to impose stressor conditions and design, monitor, and approve interrogation practices.⁴⁵² In mid-2005, the *New England Journal of Medicine* explained that since late 2002, “psychiatrists and psychologists have been part of a strategy that employs extreme stress, combined with behavior-shaping rewards, to extract actionable intelligence from resistant captives.”⁴⁵³ This is alluded to in the Kubark Interrogation manual, which states that the likelihood of success “rise[s] steeply . . . if the coercive technique is matched to the source’s personality.”⁴⁵⁴

The use of medical professionals in interrogation seemingly violates the Hippocratic Oath to not harm patients. In 1975, the World Medical Association adopted the “Declaration of Tokyo,” which stated that “[t]he physician shall not countenance, condone or participate in the practice of torture or other cruel, inhuman or degrading procedures,” under any circumstances, regardless of whether the victim is guilty or the surrounding level of societal conflict and civil strife.⁴⁵⁵ A Pentagon

449. Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 27-28 (2006).

450. MCCOY, *supra* note 59, at 159-60.

451. Marks, *supra* note 87, at 484.

452. *Docs Complicit in Prison Abuse?*, CBS NEWS, (Aug. 20, 2004) <http://www.cbsnews.com/stories/2004/08/20/iraq/main637166.shtml?tag=currentVideoInfo;videoMetaInfo>.

453. M. Gregg Bloche & Jonathan H. Marks, *Doctors and Interrogators at Guantánamo Bay*, 353 NEW ENG. J. MED. 6, (2005), available at <http://www.nejm.org/doi/full/10.1056/NEJMp058145>.

454. Parry, *supra* note 397, at 1005; KUBARK, *supra* note 148, at 86 (“[I]t is a waste of time and energy to apply strong pressures on a hit-or-miss basis if a tap on the psychological jugular will produce compliance.”).

455. Peter A. Clark, *Medical Ethics at Guantanamo Bay and Abu Ghraib: The Problem of Dual Loyalty*, 34 J.L. MED. & ETHICS 570, 573 (2006); MCCOY, *supra* note 59, at 156-57 (referencing that the International Red Cross adamantly objected to the use of health professionals in interrogation).

spokesperson insisted that participating doctors were exempt from ethics rules because they were merely advising in the capacity of "behavioral scientists."⁴⁵⁶ Thus, doctors can supposedly use their knowledge and expertise to temporarily suspend professional obligations to partake in "experiments" on detainees.⁴⁵⁷ Dr. Stephen Xenakis, a former U.S. Army doctor, further remarked:

Recognizing that any interrogation is inherently coercive, participation by mental health professionals directly conflicts with acceptable ethical roles and should be forbidden altogether. Even in the mildest interrogation, the subject is deliberately put under stress, anxiety is intentionally heightened, fears and concerns are exploited, and facts are manipulated. A person is put on the edge, perhaps confused, and is often lied to.⁴⁵⁸

V. OTHER FOREIGN INTERROGATION OPERATIONS

A. *The CIA in Vietnam*

1. *The Phoenix Program*

There are parallels between the Vietnam War and the Iraq War in terms of the CIA's use of interrogation to gather intelligence,⁴⁵⁹ but operations by the South Vietnamese, the CIA's ally, were undoubtedly physical torture, while CIA methods used in Iraq were predominately psychological interrogation.⁴⁶⁰ From the 1974 U.S. Congressional Record, South Vietnamese police official Luu Van Huu summarized: "We have 4 sorts of torture: use of force as such; threats; physical suffering, imposed indirectly; and mental or psychological torture."⁴⁶¹ It

456. MCCOY, *supra* note 59, at 183; Radack, *supra* note 449 (Physicians for Human Rights and other physicians groups condemning the interrogation practices as torture); Bloche & Marks, *supra* note 453, at 6-8.

457. Stephen N. Xenakis, *More on: "Doctors Must Be Healers"*, 37 SETON HALL L. REV. 703 703-04 (2007) (physician-author expressing dismay and stating: "According to this line of reasoning, military medical personnel should put a higher priority on fighting the war against terrorism than on abiding by the recognized ethical and moral principles of their profession.").

458. *Id.* at 707.

459. Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 449, 449-88 (2006).

460. MCCOY, *supra* note 59, at 126, 133-34 (emphasizing the chain of command for interrogation methods approved for Iraq); *See generally* Part IV(B)(3)(a) (noting general methods approved for detention facilities in foreign locations).

461. MCCOY, *supra* note 59, at 62 (citing 120 CONG. REC. 33474 (Oct. 2, 1974)).

appears that South Vietnamese interrogation operations derived from CIA ambitions. In 1965, William Colby, who would later become CIA Director, implemented the Phoenix Program, which was also called the "Counter Terror" [CT] and "Provincial Reconnaissance Units" programs.⁴⁶² The CIA and South Vietnamese forces constituted forty Provincial Interrogation Centers (PICs), and a Security Committee determined who endangered national security, frequently based upon the word of anonymous informants,⁴⁶³ and clandestine operatives captured, interrogated to generate intelligence, killed, or "turned" Vietcong detainees into double agents.⁴⁶⁴

The CIA trained the South Vietnamese, but Colby asserted during congressional investigations that the CIA transferred authority to the Vietnamese national police, which made it "entirely a South Vietnamese program."⁴⁶⁵ Colby admitted to Congress that the program killed approximately 20,587 suspects from 1968 to 1971,⁴⁶⁶ but attested that Phoenix "was not to be a program of assassination," as some critics alleged, and maintained that the CIA issued instructions that forbade Americans from participating in the program and required them to object to abuses.⁴⁶⁷ As for attaining intelligence against communists, a 1970-71 Pentagon study stated that only 3% of Viet Cong "killed, captured, or rallied were full or probationary [p]arty members above the district level" and that over half were not party members.⁴⁶⁸

462. DOUGLAS VALENTINE, *THE PHOENIX PROGRAM* 117 (2000).

463. Van Bergen & Valentine, *supra* note 459, at 488.

464. IAN MCNEILL, *THE TEAM: AUSTRALIAN ARMY ADVISERS IN VIETNAM 1962-1972* 385-411 (1984); MCCOY, *supra* note 59, at 64-65; Parry, *supra* note 397, at 1012-13; VALENTINE, *supra* note 462, at 13 (stating U.S. soldiers also tortured civilians and prisoners of war and the CIA established the "National Interrogation Center (NIC) and the regional Provincial Interrogation Centers.").

465. MCCOY, *supra* note 59, at 67 (citing *U.S. Assistance Programs in Vietnam: Hearing on H.R. 349 Before the Subcomm. on Gov't Operations*, 92d Cong. 349 (1971)); Van Bergen & Valentine, *supra* note 459, at 497-98.

466. MCCOY, *supra* note 59, at 67 (noting that U.S. Congressional records of the North Vietnamese and South Vietnamese estimated that those killed in Phoenix were approximately 40,000); Van Bergen & Valentine, *supra* note 459, at 459.

467. MCCOY, *supra* note 59, at 68 (citing *Nomination of William E. Colby: Hearing Before the Comm. on Armed Servs.*, 93rd Cong., 116-17 (1973) (statement of William E. Colby, Then-Nominee to be Dir. of Cent. Intelligence Agency)); Van Bergen & Valentine, *supra* note 459, at 499.

468. See GRANDIN, *supra* note 389, at 67 (stating that tens of thousands of those killed were admittedly civilians); MCCOY, *supra* note 59, at 199 (citing ANDREW F. KREPINEVICH JR., *THE ARMY AND VIETNAM* 228-29 (1986)); RALPH W. MCGHEE, *DEADLY DECEITS* 156 (1983)) ("The truth is that never in the history of our work in Vietnam did we get one clear-cut, high-ranking Viet Cong agent.").

There were anecdotal accounts suggesting that the North Vietnamese were “able to resist torture” techniques,⁴⁶⁹ but it is questionable whether this is the reason for administering excessive abuse.⁴⁷⁰ Orrin DeForest, CIA regional chief, explained what he saw at the Phoenix program PICs near Saigon in 1969: “[Those captured and interrogated were] irretrievable, just a horrible mess” from the use of torture and electric shock.⁴⁷¹

Commentators also emphasized, “the Viet Cong [North Vietnamese], too, flouted the laws of war . . . and did not respect civilian life.”⁴⁷² Communists committed well-documented “grievous breaches of the Geneva Convention” between 1965 in 1967 and there was no access to the alleged perpetrators.⁴⁷³ U.S. military tribunals existed for detainees in Vietnam, but they involved secrecy problems, no right to counsel, and no ability to rebut evidence, accusers, or appeal.⁴⁷⁴ As the recent scandals broke with Abu Ghraib, Afghanistan, and Guantanamo Bay, a JAG report explained:

The use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral ‘high road’ in the conduct of our military operations regardless of how others may operate. Our forces are trained in this legal and moral mindset beginning the day they enter active duty. It should be noted that law of armed conflict and code of conduct training have been mandated by Congress and emphasized since the Viet Nam conflict when our POWs were subjected to torture by their captors.⁴⁷⁵

469. Bell, *supra* note 11, at 354.

470. MCCOY, *supra* note 59, at 66, 68 (discussing records of surgical torture and electroshock in the Phoenix Program).

471. *Id.* at 66, 199.

472. Martin S. Flaherty, Glenn Sulmasy & John Yoo, *Hamdan and the Military Commissions Act*, 155 U. PA. L. REV. 146, 161 (2007).

473. MAJ. GEN. GEORGE S. PRUGH, VIETNAM STUDIES - LAW AT WAR: VIETNAM 1964-1973 73-4 (1975), available at <http://www.army.mil/cmh-pg/books/Vietnam/Law-War/law-fm.htm>.

474. Van Bergen & Valentine, *supra* note 459, at 488-89.

475. Memorandum from Maj. Gen. Jack L. Rives, U.S. Air Force & Deputy Judge Advocate Gen. on Final Report and Recommendations of the Working Grp. to Assess the Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism, ¶ 5 (Feb. 5, 2003), available at <http://www.torturingdemocracy.org/documents/20030205.pdf>.

Scholars disagree over the extent that U.S. military operations in Vietnam complied with the Geneva Conventions.⁴⁷⁶ For example, Professor Pearlstein contends that the U.S. military elevated human rights concerns in practice and training toward the end of the war and after abuses such as the My Lai massacre.⁴⁷⁷ Professor Jones believes that the Geneva Conventions were adhered to by recognizing local forces and the Vietcong Main Forces as lawful combatants and by deeming them prisoners of war even when they were irregular soldiers.⁴⁷⁸ The difference of opinion may predominately be due to uncertain and unclear division of responsibility among the Pentagon, CIA, and South Vietnamese forces.

2. Critics and Whistleblowers

Perhaps the earliest glimpse of what was happening came in August 1969 through a number of articles published in the *New York Times*. Colonel Robert B. Rheault, Captain Robert F. Marasco, and six other Green Berets were charged with the murder of an alleged double-agent Vietcong spy named Thai Khac Chuyen.⁴⁷⁹ During the criminal investigation, Nixon provided immunity to prevent CIA agents from testifying, which led the criminal charges to be dropped.⁴⁸⁰ Marasco later conceded that he executed Chuyen on “very clear orders from the CIA,” and that this was only one of hundreds of CIA-ordered executions.⁴⁸¹

During Congressional investigations of the Phoenix Program, Representative Ogden R. Reid was “shocked and dismayed” over the “indiscriminate killing.”⁴⁸² Victor Marchetti, a CIA analyst, explained that the CIA “recruited, organized, supplied, and directly paid CT teams, whose function was to use . . . techniques of terror—assassination,

476. GEOFFREY BEST, *WAR AND LAW SINCE 1945* 363 (1994); VERNON E. DAVIS, *THE LONG ROAD HOME: U.S. PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA* 94-95 (2000); Daryl Mundis, *The United States of America and International Justice: Has Lady Liberty Lost Her Way?*, 2 J. INT’L CRIM. JUST. 2, 6 n.16 (2004).

477. Pearlstein, *supra* note 58, at 1275. See also Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT’L L. 251, 280-81 (2009).

478. Samuel Vincent Jones, *Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence Between Contract Theory and the Scope of Civilian Immunity During Armed Conflict*, 16 DUKE J. COMP. & INT’L L. 249, 266-67 (2006).

479. MCCOY, *supra* note 59, at 66.

480. *Id.*

481. *Id.*

482. *Id.* at 67 (citing U.S. Assistance Programs in Vietnam, *supra* note 463, at 349).

abuses, kidnappings, and intimidation – against the Viet Cong⁴⁸³ No CIA officials or interrogators were investigated for the atrocities.⁴⁸⁴ Instead Congress adopted the Intelligence Agents Identity Act to protect the anonymity of CIA agents.⁴⁸⁵ Battles with the CIA emerged over whistleblowers seeking to provide personal accounts to expose CIA involvement in Vietnam.⁴⁸⁶

In his book, former CIA agent Ralph McGehee strove to expose the individuals involved in Operation Phoenix, which he called a CIA-run program of “assassination and kidnapping,” but he was silenced under laws that prevented disclosing CIA identities.⁴⁸⁷ In 1977, former CIA agent Frank Snepp published a best-selling book about his experiences in Vietnam. The CIA sued Snepp, not to thwart former agents from publicly exposing classified information, but to inhibit a former agent from revealing *anything* they were involved in as CIA agents, unless the CIA censored the material.⁴⁸⁸ In both cases, the U.S. Supreme Court ruled in favor of the CIA, focusing on the precise statutory frameworks without favoring broader First Amendment and whistleblower rights, or the value of what was being exposed.⁴⁸⁹

B. Latin America

1. Wider Use of Interrogation Approaches: The Pentagon's Project X

Perhaps the Phoenix Program caught congressional attention because of the level of abuse and operations occurred during war. However, various U.S. agencies also carried out systematic and covert interrogation training programs in Latin America.⁴⁹⁰ The ostensible justification was a security pact that the U.S. consummated with South American countries

483. MCCOY, *supra* note 59, at 63-64; Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Bush Aware of Advisers' Interrogation Talks*, ABC NEWS, Apr. 11, 2008, <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=1>.

484. MCCOY, *supra* note 59, at 69-70.

485. 50 U.S.C.A. §§ 421-426 (West 1982).

486. *Id.*

487. Clarke, *supra* note 124, at 26-27 (noting that the deaths of 20,000 between 1968 and 1971 was called the CIA's “pump and dump” approach to interrogations); Jonathan Kaufman, *Defense Cites CIA Past in Carter, Hoffman Trial*, THE BOSTON GLOBE, Apr. 10, 1987, at 72.

488. Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24(3) ST. THOMAS L. REV. (forthcoming 2012) (manuscript at 7-8).

489. See *McGehee v. United States*, 549 U.S. 1317 (2007); *Snepp v. United States*, 444 U.S. 507, 507 (1980).

490. MCCOY, *supra* note 59, at 71.

shortly after World War II to thwart threats to the region, which eventuated into a crusade against communism.⁴⁹¹ The Pentagon established USSOUTHCOM headquarters in Panama and started to train Latin American militaries and police forces at the School of the Americas in 1946.⁴⁹² Training is not complicity in torture, but in *School of the Americas*, Professor Gill summarized Pentagon involvement in Latin America:

The release of a list of some 60,000 SOA graduates in 1993 revealed the names of some of the hemisphere's most notorious dictators, death squad operatives, and assassins, and when human rights activists began comparing these names to those listed in a variety of truth commission reports, the results were startling: SOA graduates took part in some of the worst human rights atrocities in the cold war.⁴⁹³

In 1965, "Army Intelligence launched Project X to develop an exportable foreign intelligence package to provide counterinsurgency techniques learned in Vietnam to Latin American countries."⁴⁹⁴ Under Project X, the Pentagon produced at least seven counterinsurgency training manuals in Spanish; instructed Latin American militaries and security forces, including at the School of the Americas from 1966 to 1991;⁴⁹⁵ conducted training programs and distributed manuals inside host countries such as Columbia, Ecuador, El Salvador, Guatemala, and

491. GRANDIN, *supra* note 389, at 4, 40; Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 130-37 (2012).

492. CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* 136 (2004).

493. LESLEY GILL, *THE SCHOOL OF THE AMERICAS: MILITARY TRAINING AND POLITICAL VIOLENCE IN THE AMERICAS* 137 (2004).

494. MCCOY, *supra* note 59, at 71 (citing Memorandum from Dep't of Def., Office of the Asst. Sec'y of Def. Command, Control Commc'ns and Intelligence, on USSOUTHCOM CI Training – Supplemental Information (U) (July 31, 1991); Memorandum from Dep't of Def., Asst. to the Sec'y of Def., on Interim Report on Improper Material in USSOUTHCOM Training Manuals (U) – Information Memorandum, [Sgd.] Werner E. Michel (Oct. 4, 1991) [hereinafter "Interim Report on Improper Material"]).

495. MCCOY, *supra* note 59, at 86, 105-06 (citing Memorandum from Michael E. Michel, Asst. to the Sec'y of Def. (Intelligence Oversight), on Improper Material in Spanish-Language Intelligence Training Manuals (Mar. 10, 1992)); *id.* at 88 (citing Army Intelligence Center and School, Project X, Annual List of Instructional Material (Aug. 1977)) (stating training was in Panama from 1966 to 1976 and then the school moved to Fort Benning, Georgia); Parry, *supra* note 397, at 1015 (explaining SOA Training was structured into hundreds of units and modules akin to university courses with graduation certificates.).

Peru;⁴⁹⁶ and mailed thousands of manuals to those nominated as “nonresident foreign students”⁴⁹⁷

In a 1992 audit, Congress defined the manuals as “improper material in Spanish language intelligence training.”⁴⁹⁸ During congressional hearings, the assistant secretary of defense claimed that the Pentagon had lost control of the program and that it “evaded the established system of doctrinal controls,” but U.S. Army intelligence officers thought their training operations were “legal and proper.”⁴⁹⁹ These were similar to the explanations provided during recent investigations of detainee abuse.⁵⁰⁰

496. Comm’n for Historical Clarification Conclusions and Recommendations, *Guatemala Memory of Silence* (Feb. 1999), ¶¶ 50-51, available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html> (noting in the Guatemalan Truth Commission report that “extreme cruelty was used by the State to cause social disintegration” from 1962 to 1996); GRANDIN, *supra* note 389, at 90 (“Guatemala’s basic training . . . put cadets through a curriculum designed to purge civilization out of them: they were beaten, degraded.”); Interim Report on Improper Material, *supra* note 494 (stating there was much civil conflict between Guatemala and El Salvador during the 1980’s); MCCOY, *supra* note 59, at 88 (citing Memorandum from Dep’t of Def., on USSOUTHCOM Proposed Counterintelligence (CI) Training to Foreign Governments (July 30, 1991); Memorandum from Dep’t of Def., on USSOUTHCOM CI Training – Supplemental Information (July 31, 1991)).

497. MCCOY, *supra* note 59, at 78 (citing Army Intelligence Center and School, *supra* note 493).

498. *Id.* at 86-87, 89 (citing Memorandum from Dep’t of Def., Asst. to the Sec’y of Def., Report of Investigation: Improper Material in Spanish-Language Intelligence Training Manuals (Mar. 10, 1992); Senate Committee on Intelligence, *Honduran Interrogation Manual Hearing Before S. Comm. on Intelligence* (June 16, 1988) (discussing Congress hearings, evidence of additional manuals, details of the 1983 Honduran manual, and noting that the Pentagon taught tactics of control over foreign security forces, including “motivation by fear, payment of bounties for enemy dead, beatings, false imprisonment, executions and the use of truth serum.”).

499. MCCOY, *supra* note 59, at 106 (citing Michel, *supra* note 493) (noting that the assistant secretary recommended that all Latin American governments “destroy” their manuals); GRANDIN, *supra* note 389, at 219 (“the Pentagon in the early 1990s again advised the Colombian armed forces to create a ‘more efficient and effective’ intelligence network by keeping their operations ‘covert’ and ‘compartmentalized’ and by not putting orders ‘in writing.’”).

500. Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and “Conduct Unbecoming,”* 26 LAW AND INEQ. J. 1, 2-3 (2008) (noting that “[m]any soldiers believed that officers are insulated against prosecution for wrongdoing by the political experience of pushing blame to the lowest possible level, where it does not reflect as poorly on the judgment of military and civilian leaders.”). At the beginning of his criminal trial, David Passaro, a CIA contractor, wanted to introduce classified memos and e-mails, and subpoena CIA officials to prove that CIA superiors directed and approved of abusive practices, but the judge denied his request in closed hearing on the basis of protecting state secrets. Ryan P. Logan, Note, *The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq*, 39 VAND. J. TRANSNAT’L L. 1605, 1635 (2006). As his defense for

Likewise, in June 1996, President Clinton's Intelligence Oversight Board deemed the manuals "improper instruction materials," determined that assassinations and abusive practices were on "guerrillas," and that abuse in Central America was without Pentagon knowledge.⁵⁰¹

A declassified Pentagon manual explained that training methods included "the use of sodiopentathol compound in interrogation, abduction of adversary family members to influence the adversary, prioritization of adversary personalities for abduction, exile, physical beatings and execution."⁵⁰² *Handling of Sources*, which was declassified in 1996, expounds the processes for securing loyalty among recruits and assets (e.g. "employees" and "guerilla recruits").⁵⁰³ Officials should appeal to "mercenary motivations," utilize "fear as a weapon," or carry out an "arrest or detention of the employee's parents, imprison the employee or give him a beating."⁵⁰⁴ If the "employee" is suspected of deception, superiors should commence with "friendly character interrogations," and may intensify operations by using sodium pentathol.⁵⁰⁵ If the "employee" defected, the manual states that superiors can use "brain wash[ing]," imprison the employee, set the employee up "to commit an illegal act," send the "employee" into "a specially dangerous mission for which he has been inadequately prepared," or "pass information to guerilla security elements" so that the enemy would carry out the assassination on the disloyal employee.⁵⁰⁶

2. FM 34-52

In September 1992, merely three months after Congress scrutinized Project X, the Pentagon produced *FM 34-52: Intelligence Interrogation*.⁵⁰⁷ *FM 34-52* states that "[p]hysical or mental torture and

committing human rights abuses during the Abu Ghraib scandal for which he received a ten-year military prison sentence, Spc. Charles Graner Jr. stated that he was acting on orders from "civilian contractors as well as military intelligence." *Graner sentenced to 10 years for abuses*, CNN, Jan. 15, 2005, available at <http://www.cnn.com/2005/LAW/01/15/graner.court.martial/>.

501. MCCOY, *supra* note 59, at 105.

502. *Id.* at 71.

503. *Id.* at 88.

504. *Id.* at 87-88 (citing ARMY INTELLIGENCE CTR. AND SCH., STUDY MANUAL: HANDLING OF SOURCES - 1989 5-6, 24-25, 42-44, 65-66, 110-12, 116-33 (1996)).

505. *Id.* (stating if this "employee" did turn on the Pentagon or allies, then our agent should "initiate termination proceedings," which are "limited only by the agent's imagination.").

506. *Id.*

507. DEP'T OF THE ARMY, *supra* note 99.

coercion revolve around eliminating the source's free will, and are expressly prohibited [Torture] yields unreliable results . . . and can induce the source to say what he thinks the interrogator wants to hear."⁵⁰⁸

Providing anticipatory extenuation, the manual imparts: "[k]nowing the enemy has abused U.S. and allied [POWs] does not justify using methods of interrogation specifically prohibited"⁵⁰⁹ The document further affirms that detainee "abuse and torture are to be avoided at all costs, in part because they can degrade the intelligence collection effort."⁵¹⁰ This new text even referenced methods that the CIA had researched⁵¹¹ and banned electric shock, physical abuse, infliction of pain, intimidation, psychological torture, threats, use of drugs, imposing prolonged stress positions, mock executions, and sleep deprivation.⁵¹² New standards appeased the early 1990's congressional debates over providing a higher level of protection for the UN's Convention Against Torture and for criminalizing torture under U.S. law.⁵¹³

Generally, the history in Vietnam in Latin America has been supplanted by FM 34-52 standards. Army Reserve Colonel Walter Schumm remarked: "[i]t only takes one improperly trained soldier among a thousand to commit an offense against the Geneva Conventions that would cause our nation considerable embarrassment."⁵¹⁴ Navy lawyers warned that the post-9/11 interrogation techniques might "reverse fifty years of a proud tradition of compliance with the Geneva Conventions."⁵¹⁵ After torture scandals arose, media chronologies punctuated that Pentagon officials were consumed with, viciously debated, and deeply assessed legal and effective interrogation techniques for Guantanamo Bay.⁵¹⁶ Standards in FM 34-52 provided the initial

508. *Id.* at 1-8. See ARMY INTELLIGENCE CTR. AND SCH., *supra* note 493, at 5-6, 24-25, 42-44, 65-66, 110-12, 116-33.

509. MCCOY, *supra* note 59, at 87-88.

510. O'Connell, *supra* note 433, at 5136.

511. DEP'T OF THE ARMY, *supra* note 99, at 1-8 to 1-9 (listing banned approaches, including "brainwashing, physical or mental torture, or any other form of mental torture, or any other form of mental coercion [including use of drugs].").

512. MCCOY, *supra* note 59, at 102-03.

513. *Id.* at 105-06 (demonstrating that earlier media releases portrayed SOA classes as teaching humane methodology). See also GRANDIN, *supra* note 389, at 106 (citing Steven Strasser, *Teaching the ABC's of War*, NEWSWEEK, Mar. 28, 1983; Richard Halloran, *Salvador Gets Right Lesson from the US*, N.Y. TIMES, Apr. 18, 1982, § 1).

514. Dave Moniz, *US Missed Chances to Stop Abuses*, USA TODAY, May 13, 2004, http://www.usatoday.com/news/world/iraq/2004-05-13-warnings_x.htm.

515. *Id.*

516. Bill Dedman, *Gitmo Interrogations Spark Battle Over Tactics*, MSNBC (Oct. 23, 2006), http://www.msnbc.msn.com/id/15361458/ns/world_news-terrorism/t/gitmo-interrogations-spark-battle-over-tactics/; Phillippe Sands, *The Green Light*, VANITY FAIR,

framework for interrogation until December 2002.⁵¹⁷ However, more intense approaches were adopted to procure intelligence information. Many of the later approved interrogation methods were akin to practices found in the earlier U.S. military interrogation manuals.⁵¹⁸

3. *The CIA in South America*

In addition to Vietnam, during the early-1960s, the CIA brought interrogation practices to the Philippines and across Latin America as "Public Safety Programs."⁵¹⁹ Congress investigated CIA involvement in training the notably rough Brazilian police.⁵²⁰ In congressional hearings, the head of the U.S. Office of Public Safety (OPS) for Brazil testified that OPS only taught "minimum use of force" and "humane methods."⁵²¹ Years later, it came to light that CIA officer Dan Mitrione taught abusive interrogation methods for eight years in Brazil, the Dominican Republic and Uruguay.⁵²² One of the attendees described how Mitrione relayed that CIA physical interrogation methods were "a complex art" that required administering "the right pain in the right place at the right time," while psychological interrogation was designed to "humiliate the victim, separating him from reality, making him feel defenseless."⁵²³

Congress cut all funding and abolished the OPS in July 1975,⁵²⁴ but no operatives were ever investigated. The CIA apparently continued to train interrogation to dismantle subversion in Central and South America

May 2008, available at <http://www.vanityfair.com/politics/features/2008/05/guantanamo200805>.

517. Wallach, *supra* note 96, at 578; DEP'T OF THE ARMY, *supra* note 99, at 3-1 to 3-33.

518. MCCOY, *supra* note 59, at 71, 86-9, 105-06; Parry, *supra* note 397, at 1015.

519. MCCOY, *supra* note 59, at 11; Stockwell, *supra* note 278 (explaining that they taught approaches that use electroshock, and that Dan Mitrione, the famous exponent, did seven years in Brazil and three in Uruguay).

520. MCCOY, *supra* note 59, at 73.

521. *Id.* (citing *United States Policies and Programs in Brazil: Hearing Before the Subcomm. on W. Hemisphere Affairs*, 92d Cong. 17-20, 39-40 (1971) (response from Theodore D. Brown)).

522. *See id.* at 72 (stating Dan Mitrione, CIA operative and police advisor for the US Public Safety Program, was kidnapped and executed in Montevideo by Tupamaro guerillas.); Clarke, *supra* note 124, at 37-38; A.J. Langguth, *Torture's Teachers*, N.Y. TIMES, June 11, 1979, at A19, <http://msuweb.montclair.edu/~furr/langguthleaf.html> (stating at the time of Mitrione's death, he was perceived as an American hero, while a senior Uruguayan police official, Alejandro Otero, later publicly described that Mitrione was training Latin American police and death squads in "violent techniques of torture and repression.").

523. MCCOY, *supra* note 59, at 72-73; Clarke, *supra* note 124, at 37-38.

524. MCCOY, *supra* note 59, at 73 (citing *Foreign Assistance Act of 1974: Hearing on S. 3394 Before S. Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974)).

with the Army's Military Adviser Program,⁵²⁵ perhaps until 1987.⁵²⁶ Several manuals were uncovered in a CIA internal review, and Senator David Boren called the manuals "completely contrary to the principles and policies of the United States."⁵²⁷ After CIA Deputy Director Richard Stoltz was asked under oath who was responsible for these programs and manuals, his four-line response was blackened out.⁵²⁸ Greg Grandin, NYU Latin American History Professor, described the manuals as teaching foreign security services interrogation methods "designed to induce psychological fear, sexual humiliation, and physical stress and cause sensory deprivation," and "regulate the application of suffering."⁵²⁹ In his book, Professor Alfred McCoy contended that Congress's later investigations "established unequivocally that the [CIA] had coached military interrogators throughout the region, propagating the systematic tortures that became the hallmark of its military dictatorships."⁵³⁰ Similarly, Professor John Parry explained, "[t]estimony of torture victims and anecdotal evidence indicate that U.S. officials sometimes were present during interrogations that included torture, although a CIA investigation declared with respect to Honduras that '[n]o evidence has been found to substantiate the allegation . . . that . . . any . . . CIA employee was present during sessions of hostile interrogations . . .'"⁵³¹

Parry further emphasized the reality: "In sum, U.S. officials pioneered a torture by proxy approach in Latin America."⁵³² The media occasionally reported on CIA involvement with interrogation training in South America toward the end of the Cold War, but the CIA frequently denied intricate involvement.⁵³³ Stories were fleeting and produced neither lasting investigations nor a strong public memory of events.⁵³⁴ A few years later, the Bush Administration approved, and the CIA and

525. MCCOY, *supra* note 59, at 74.

526. Stockwell, *supra* note 278.

527. *Honduran Interrogation Manual Hearing*, *supra* note 498, at 3-5, 23-24 (noting Senator Frank H. Murkowski would not acknowledge manuals sitting in front of him and instead stated, "Mr. Chairman, I feel very uneasy about getting into these areas. . . . I really question the propriety. I mean, hell, there's [sic] a million reports." The U.S. media delicately reported about the CIA's training interrogation/torture at the same time of the hearings.).

528. *Id.* at 28-29, 33-35 (promising the "senators that the CIA's inspector general would conduct a prompt review" of the allegations, but to this day there has never been any information released that suggests such an investigation was ever conducted.).

529. GRANDIN, *supra* note 389, at 107-08.

530. MCCOY, *supra* note 59, at 86.

531. Parry, *supra* note 397, at 1016.

532. *Id.*

533. MCCOY, *supra* note 59, at 106.

534. *Id.* at 106.

Pentagon reintroduced, equivalent approaches while suffering from institutional amnesia when confronted with enormous criticism.⁵³⁵ The CIA's history in developing the methods was being supplanted. The CIA knew that law prohibited excessive coercion, stress techniques, and psychological torture.⁵³⁶

C. Britain and Northern Ireland.

1. The Atrocious Event and Impact on Victims.

Contumelious interrogation practices also embroiled Britain in scandal. On July 23, 1971, "1,800 British troops raided houses" across Ireland and confiscated documents on behalf of the Royal Ulster Constabulary (RUC), Britain's counter terrorism police unit.⁵³⁷ The army examined the information, and on August 5, 1971, they kidnapped 342 individuals at gunpoint in the middle of the night and transported them to detention centers for interrogation.⁵³⁸ After their release, detainees provided accounts of how they were hooded, stripped naked, handcuffed, thrown around, beaten, placed in sensory deprivation environments and stress positions, required to stand for nearly two days straight, exposed to loud music, and deprived of food and water.⁵³⁹ Interrogators also used tactics of deception, instilled dread, and falsely accused detainees of being guilty of terrorism.⁵⁴⁰

Confirming the findings of CIA-sponsored research, the British government's inquiry of the interrogations acknowledged that sensory isolation can induce an "artificial psychosis or episode of insanity," and other scientific studies punctuated the dangers of permanent damage from sensory isolation.⁵⁴¹ Tim Shallice, a British psychologist,

535. See generally *id.* at 108-50.

536. NAT'L SECURITY ARCHIVE, *Prisoner Abuse: Patterns From the Past* (May 12, 2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/>.

537. STREATFEILD, *supra* note 141, at 100.

538. *Id.* at 100-02.

539. *Id.* at 102-05, 113, 125 (citing *Ireland v. United Kingdom*, 25 EUR. CT. H.R. (ser. A), at 41, 66 (1978)) (quoting twelve men's accounts of interrogation for six days; "fed only the occasional cup of water or crust of bread," prevented from washing or using the bathroom, and "made to stand against the wall for periods of up to forty-three and a half hours.").

540. *Id.* at 113.

541. Buenaventura, *supra* note 72, at 124 (noting The Center for Victims of Torture notes that "[p]sychological symptoms of torture include anxiety, depression, irritability, . . . nightmares, impaired memory, and memory loss."). Pinochet's psychological torture victims generally suffered a "paranoia. . . that greatly surpasses anything observed in anxiety disorders. . . [The victim] remains a tired human being, relatively uninterested

discovered that many of the Irish victims who were subjected to scripted manipulations and abuses became “psychotic,” and experienced “hallucinations” and “delusional beliefs” after only twenty-four hours of detention.⁵⁴² Dr. Pearse O’Malley examined detainees and confirmed similar symptoms, finding that one man constantly trembled, “refused to be left alone,” and had difficulty putting sentences together.⁵⁴³ Another victim “shutter[ed] spasmodically and [complained] of violent headaches, insomnia and nightmares.”⁵⁴⁴ Pearse concluded that one detainee might suffer “permanent mental damage.”⁵⁴⁵ Professor Robert Daly also examined the victims and testified that they suffered from feelings of fear, dread, and anxiety that caused insomnia, recurring nightmares, and suicidal-prone depression.⁵⁴⁶ Daly explained the victims’ common accounts in the context of the underlying interrogation methodologies:

Being awoken in the middle of the night, being beaten, confused as to your whereabouts, lied to and insulted, was all part of the ‘unfreezing process’ through which your psychological senses were broken down, and terror and humiliation were induced. Hence, the photographing in the nude, being forced to urinate while running, refusal to allow toilet visits, the sadism and abuse. Meanwhile the psychological functions of the body were being disturbed by the very low or non-existent intake of calories, high temperatures caused by sweating which could lead to dehydration, coupled with the cold at night, sleep deprivation and loss of sense of touch. The whole experience was a package. Whether you want to call it interrogation in depth or brain washing is academic. The aim of the treatment was to cause

and unable to concentrate,” and not only “disoriented but emotionally and psychologically damaged, in some cases for the rest of their lives.” MCCOY, *supra* note 59, at 9-10 (citing Otto Doerr-Zegers, Lawrence Hartmann, Elizabeth Lira & Eugenia Weinstein, *Torture: Psychiatric Sequelae and Phenomenology*, 55(2) PSYCHIATRY 177, 178-83 (1992)). See also Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. TOL. L. REV. 1, 28 (2009).

542. MCCOY, *supra* note 59, at 58; STREATFEILD, *supra* note 141, at 114.

543. STREATFEILD, *supra* note 141, at 130.

544. *Id.*

545. *Id.*

546. *Id.* (citing IRISH TIMES, July 9, 1973).

temporary psychosis, temporary insanity, which was a severe psychological injury liable to having lasting consequences.⁵⁴⁷

Amnesty International explained that the British method of disorientation by sensory deprivation was an especially immoral crime and “as grave an assault on the inherent dignity of the human person” as physical torture.⁵⁴⁸ Similarly, the Irish Republic’s 8,400-page report, submitted to the European Court of Human Rights (ECHR), punctuated that the interrogation process involved “a clear resemblance to those methods of systematic torture” employed for centuries.⁵⁴⁹ However, the ECHR drew a distinction between physical and psychological torture by calling psychological torture an “infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault.”⁵⁵⁰ To constitute torture, “ill treatment [must] attain a minimum level of severity . . . The assessment of the minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age or state of health of the victim.”⁵⁵¹ The ECHR ruled that the British government’s abuse was cruel, inhuman, and/or degrading treatment, but not torture.⁵⁵² The Court seemed to favor Britain’s arguments, which focused on legal definitions and purported necessity of fighting IRA terrorism.⁵⁵³ Experts have called the court decision biased and politically motivated.⁵⁵⁴

547. Armen Victorian, *United States, Canada, Britain: Partners in Mind Control*, 1 MINDNET J., no. 81, July 1996, available at <http://www.elfis.net/elfol0/mkconsp/mkuscan.txt> (citing Robert Daly, *Psychiatric After-Effects of the Irish Prisoners Subjected to Ill-Treatment and Torture*, NEW SCIENTIST, Aug. 5, 1976).

548. AMNESTY INT’L, REPORT OF AN ENQUIRY INTO ALLEGATIONS OF ILL-TREATMENT IN NORTHERN IRELAND 36-38 (1972), available at <http://www.amnesty.org/es/library/asset/EUR45/001/1976/en/226ef707-6b68-4a53-914325ee2bb46d3f/eur450011976en.pdf>.

549. MCCOY, *supra* note 59, at 57.

550. RODLEY, *supra* note 48, at 4-9.

551. *Ireland v. United Kingdom*, 25 EUR. CT. H.R. 58 (ser. A) (1978).

552. *Id.* at 66-67; Keller, *supra* note 280, at 578.

553. John T. Parry, “Just for Fun”: *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT’L SEC. L. & POL’Y 253, 267-68 (2005). MCCOY, *supra* note 59, at 57 (citing PARKER OF WADDINGTON, REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO CONSIDER AUTHORIZED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM 2, 4-5, 16-17 (1972)) (noting that there is no guidance or definition to distinguish “discomfort” to allegedly assist information gathering from illegal “torture.”).

554. Keller, *supra* note 280, at 579-80.

2. Consistency with CIA Approach and Similar Rationales to Avoid Responsibility

Professor Martha Minow explained that British techniques resemble those used by the CIA, including “coercive tactics, such as covering a detainee’s head with a hood, depriving him of sleep, restricting his access to food and water, and exposing him to excessive noise, all of which British forces have used against suspected members of the IRA.”⁵⁵⁵ However, given the prolonged nature of detentions and the elevated harm to detainees, it is highly probable that recent interrogations by the CIA and Pentagon should be deemed torture, unlike the ECHR’s assessment of the British offenses. Methods employed in both cases are also akin to the steps laid out in the *Kubark* interrogation manual in 1963.⁵⁵⁶ Even though psychological interrogation generally leaves no physical marks, it does leave grave psychological wounds on victims.⁵⁵⁷

British arguments in the ECHR case parallel how the Bush administration, CIA, and Pentagon frequently shirked responsibility for condemned operations. Professor Jennifer Moore identifies three steps in which states denounce torture but practice it anyway and evade responsibility: “(1) straight denial that torture occurs; (2) scapegoating of so-called “bad apples” who are deemed to practice torture outside their official capacity and authority; and (3) “narrowing the definition of torture such that acts of torture are deemed not to constitute torture.”⁵⁵⁸ One can add a fourth step of “conducting exculpatory investigations.”

First, with regard to straight denial, the Bush Administration, CIA, and Pentagon frequently denied that torture occurred.⁵⁵⁹ The British report provided explanations, such as “wall standing” was never imposed for more than four to six hours and was not a “stress position,” but was used to “impose discipline” and provide “security.”⁵⁶⁰ “Hooding,” they claimed, was for the protection of the captives, and “some complainants kept their hoods on when they could have removed them if they

555. Martha Minow, *What is the Greatest Evil?: The Lesser Evil: Political Ethics in an Age of Terror*, 118 HARV. L. REV. 2134, 2162 (2005); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1426 (2008) (the “collective punishment” on Irish communities “fueled violent nationalism”).

556. See MCCOY, *supra* note 59, at 10-12.

557. *Id.* at 91 (CIA manual stating that “the threat to inflict pain can trigger fears more damaging than the immediate sensation of pain.”).

558. Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT’L L. & POL’Y 33, 47 (2006).

559. Bejesky, *supra* note 29.

560. STREATFIELD, *supra* note 141, at 128.

wished.”⁵⁶¹ The Report claimed there were no “beatings,” but rather bruises were from accidents “in transit.”⁵⁶² Further, detainees were not denied the use of bathrooms, but instead, they claimed that people such as “Paddy Joe McClean” repeatedly soiled themselves by their own choice.⁵⁶³

Second, government officials in both cases implied that those in the chain of command did not precisely implement directives. This constitutes the “bad apples” explanation in the U.S. The Bush White House systematically downplayed involvement in issuing directives and interrogation standards.⁵⁶⁴ The British “bad apples” are onerous to identify because the British official investigation, called the *Compton Report* of November 3, 1971, accepted evidence from 138 defense witnesses – “[ninety-five] soldiers, twenty-six RUC men, eleven prison officers, two regimental medical officers,” and four medical specialists and civilian doctors, but did not take evidence from *one* of the 342 men kidnapped.⁵⁶⁵ Investigators ignored 342 out of 342 victims and interviewed self-interested witnesses who would presumably offer the least offensive account. British author Dominic Streatfeild noted that “the identities of [the] . . . Interrogators [involved in the British atrocities] have never been officially revealed,” nor have the actual locations of the interrogations.⁵⁶⁶ In effect, there was no real investigation.

Third, in both cases, because there were unsuccessful cover ups and verified illegal activities that captured public attention, it became pointless for the governments to continue to deny the least dreadful account. In the so-called “war on terror,” thousands of suspects were detained in various parts of the world and subjected to harsh interrogations, supposedly to protect Americans from a hidden enemy; however, numerous scholars believe that abusive interrogation methods are more apt to generate creative stories than realistic plots.⁵⁶⁷ In Britain,

561. *Id.*

562. *Id.* at 128.

563. *Id.*

564. Bejesky, *supra* note 29; Memorandum from Sec’y of Def. Rumsfeld, to James T. Hill, Commander, on U.S. S. Command: Counter-Resistant Techniques in the War on Terrorism 5 (Apr. 16, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf> ([t]he purpose of all interviews and interrogations is to get the most information from a detainee with the least intrusive method, always applied in a humane and lawful manner with sufficient oversight by trained investigators or interrogators.”).

565. STREATFEILD, *supra* note 141, at 127-28.

566. *Id.*

567. *See supra* Part II(C).

the government adopted the Compton Report as the "Parker (Majority) Report" and the "Gardiner (Minority) Report," with the latter portraying more criticism.⁵⁶⁸ The Parker Report contended that the interrogations were necessary security measures, but the Gardiner Report concluded that no "crucial intelligence had been gained from the interrogations," "procedures were and are illegal" under British law, and "no Army directive and no minister could lawfully or validly have authorized the use of the procedures."⁵⁶⁹

A fourth similarity is that the government conducts investigations, but does not attribute real responsibility. The Pentagon conducted at least fourteen investigations of its own operations, offered competing theories of culpability, and assessed minimal responsibility.⁵⁷⁰ When there is no rational justification, the government claims it will not do it again and may offer an apology.⁵⁷¹ Referring to the British case, Roy Hattersley, Deputy Foreign Affairs Spokesman, stated "[i]t was [a whitewash] . . . I don't want to sound too cynical. But . . . investigators of those facts in those circumstances were going to be sympathetic toward the Army."⁵⁷² Hattersley contributed his impression of parliament's position, "[w]ell, it's just better not to let them know that we're doing it . . . It's just better not to enquire into how they're doing this sort of thing."⁵⁷³ The British government adopted the Gardiner Report for purposes of portraying dissent and a more realistic portrayal of the events and adopted the Parker Majority Report for purposes of exculpating liability. On March 2, 1972, Prime Minister Heath disavowed the methods before the House of Commons.⁵⁷⁴ Then, in February 1977, Britain's Attorney General explained before the ECHR that the "'five techniques' will not in any circumstance be reintroduced as an aid to interrogation."⁵⁷⁵

In *Ireland v. The United Kingdom* ECHR case, the world attained a view of the CIA's psychological interrogation practices.⁵⁷⁶ Practices

568. STREATFEILD, *supra* note 141, at 131 (stating, for example, the Gardiner Report referenced scientific research and explained that "[i]nterrogation in depth" was a method of "Sensory Deprivation leading to mental disorientation," and that the Majority Report did not accurately describe the facts, such as how long captives were meant to remain in stress positions).

569. *Id.*

570. Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 2009 CARDOZO L. REV. DE NOVO 96, 97.

571. *Id.*

572. STREATFEILD, *supra* note 141, at 129.

573. *Id.* at 130.

574. *Id.* at 131.

575. *Id.*; MCCOY, *supra* note 59, at 57.

576. *Ireland*, 25 EUR. CT. H.R. at ¶¶ 104, 167 (1978).

denounced at Abu Ghraib in 2004 had already been condemned by the rest of the world decades earlier,⁵⁷⁷ but the American mainstream media rarely connected the histories or the comparable methods. It should not be astonishing that Europeans were the most outraged and vocal about what was happening at Abu Ghraib, but Americans might be persuaded by other views without accurate knowledge of the historical context.⁵⁷⁸ For example, former career military intelligence officer Ralph Peters wrote in the *New York Post* that European nations were critical and their “demands to shut down our Guantanamo lock-up for terrorists have nothing to do with human rights. They’re about punishing America for our power and success.”⁵⁷⁹

3. *The Convention Against Torture*

In December 1984, the UN General Assembly unanimously adopted the Convention Against Torture (CAT) due to government abuse of citizens, advocacy from humanitarian organizations, and documentation of atrocities.⁵⁸⁰ Banning both physical and psychological torture, Article I states:

[Torture is] 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 intimidating or coercing him or a third person .

⁵⁸¹
...

577. *Id.* at ¶¶ 32, 34, 39, 81, 96-97, 104, 167; SIR EDMUND COMPTON, REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND, ¶¶ 1, 46-52, 64, 92, 98 (1971); JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 4-8 (2000) (explaining five main techniques that caused extensive psychological damage included food and water deprivation, hooding, stress positions, loud noise, sleep deprivation); MCCOY, *supra* note 59, at 54-56.

578. See generally IN THE NAME OF DEMOCRACY, *supra* note 66, at 84-99.

579. Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 569 (2008).

580. See generally HANS DANIELUS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984), available at <http://www.untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>.

581. *Id.*

President Reagan signed the Convention Against Torture on April 18, 1988, and the Senate ratified it on October 27, 1990.⁵⁸² The Reagan Administration objected to the “cruel and inhuman” language in the CAT, but ratified the agreement based on “greatly broadened” definitions of torture in the U.S.⁵⁸³ The Reagan Administration also wanted to replace the language of “for such purpose” with “deliberately and maliciously” inflicting the harm.⁵⁸⁴ Perhaps offering what might be perceived as a more legitimate rationale, such as attaining information about an alleged security threat, the government could make an abuse appear more justified than when governments abuse citizens to inflict fear, punish, intimidate, instill obeisance, or some voyeuristic reason. The Bush Administration followed a similar, cramped interpretation of torture.⁵⁸⁵ The Bybee memo, for example, strove to limit responsibility for torture, and derivatively the definition, by accentuating the mental state of the interrogator.⁵⁸⁶

Clinton signed and Congress ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment in 1994, but the U.S. made reservations so that only *physical* torture was called illegal, and psychological torture was not categorically deemed illicit from the perspective of U.S. officials.⁵⁸⁷ The UN was quite concerned with interrogators using “mind altering substances” or procedures that could “‘disrupt profoundly’ the senses or personality.”⁵⁸⁸

582. 136 CONG. REC. S17486, S17491-2 (Oct. 27, 1990); 134 CONG. REC. S6464-02 (May 23, 1988).

583. John Hagan, Gabrielle Ferrales & Guillermina Jasso, *Collaboration and Resistance in the Punishment of Torture in Iraq: A Judicial Sentencing Experiment*, 28 WIS. INT'L L.J. 1, 11 (2010).

584. J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 41 (1988). Another Reagan administration definition provided that torture “must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.” See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Hearing Before the S. Comm. on Foreign Relations*, S. EXEC. REP. NO. 101-30, at 15 (1990).

585. Scheppele, *supra* note 67, at 287 (explaining the US reservations and understandings offer a “more cramped definition of torture than the rest of the civilized world.”).

586. Waldron, *supra* note 67, at 1704.

587. MCCOY, *supra* note 59, at 100-01 (citing Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-102 (1988); *Convention Against Torture: Hearing Before the Comm. on Foreign Relations*, 101st Cong. 1, 12-18, 34-35, 40-43, 66-69, 70-71 (1990)).

588. IN THE NAME OF DEMOCRACY, *supra* note 66, at 181.

Also, in 1994, "torture," as narrowly defined, was introduced as a crime in U.S. criminal law, subject to punishment of twenty years in prison.⁵⁸⁹ In March 2005, as the Bush Administration resolutely employed questionable approaches, CIA Director Porter Goss testified before the Senate that "there are no techniques . . . that are being employed that are in any way against the law or would . . . be considered torture."⁵⁹⁰ He further explained: "All approved interrogation techniques, both past and present, are lawful and do not constitute torture."⁵⁹¹

VI. CONCLUSION

While the CIA laid out a blueprint for psychological interrogation that synthesized research on sensory deprivation, coercion, self-inflicted pain, and other methods that condemned by democracies throughout the world, the Bush Administration reintroduced akin interrogation approaches with the perceived high gravity of threat following 9/11. As arguments favoring the methods are premised on utilitarian notions, a formula, $B(P) > H + R(S)$, was introduced.⁵⁹² $B(P)$ represents the benefit of averting a terror plot multiplied by the probability that the plot can be discovered by utilizing interrogation methods. H represents the compromise to American values when torture or cruel and inhumane punishment is used. $R(S)$ represents the individual right violations, multiplied by the severity of the violation.⁵⁹³

The Bush Administration and supporters adamantly argued that interrogation methods foiled terrorist plots, but it became clear that the White House tended to exaggerate.⁵⁹⁴ Many scholars contend that torture cannot effectively reveal valid information even if there are alleged plots and a knowledgeable suspect is interrogated.⁵⁹⁵ Navigating these positions has proven formidable because data on the number of detainees interrogated, information revealed, and types of interrogation methods used remains classified under national security rules.⁵⁹⁶ Also, any potentially-pertinent data disclosed during an interrogation may still require extrapolations to maintain that a plot existed and would have occurred "but for" interrogations. One method by which to draw more

589. MCCOY, *supra* note 59, at 101 (citing 140 CONG. REC. 827 (1994); Foreign Relations Authorization Act, 18 U.S.C.A. § 2340 (West 2004)).

590. MCCOY, *supra* note 59, at 101.

591. *Id.* at 170-71.

592. *See supra* Part II(B)(1).

593. *See supra* Part II(B)(1).

594. *See supra* Part II(C)(1).

595. *See supra* Part II(C)(1)-(2).

596. *See supra* Part II(C)(1)-(2).

informed opinions is to examine the intricacies of interrogation techniques and to assess what could be expected from recently employed approaches.

The U.S. premised its need to study interrogation on Cold War threats. CIA research not only involved psychological interrogation that sought to generate emotional confusion and disrupt mental faculties for abating resistance, but also included more intense approaches involving drugs and electroshock.⁵⁹⁷ It is disconcerting that research intentions of disturbing the mind to inflict a confused, hypnotic, and subconscious state during interrogation coalesced with what the CIA called "brainwashing," or behavioral modification.⁵⁹⁸ Methods that utilize self-inflicted pain, emotional turmoil, and interrogator coercion might inadvertently produce false confessions because the victim can be expected to consciously desire to alleviate emotional and mental pain or unconsciously invent stories by accepting the interrogator's persuasion. On the other hand, if psychological interrogation failed in a substantial percentage of cases, then the CIA probably would not have advanced standard procedures and written textbooks. The interrogators must sort through the legitimate from the false, which might not make B(P) overwhelmingly steep.

Harm to the detainee (H + R(S)) constitutes a resurfacing predicament in this history. Stanley Milgram's research confirmed the power of authority to urge subordinates to do what they would not otherwise do, either based on what was directly ordered or what got out of control.⁵⁹⁹ This might suggest that some interrogators can be expected to be adamant and harsh with the detainee depending on orders from supervisors and expectations regarding the detainee. Specific atrocities include Dr. Ewen Cameron's three-step approach, the MKUltra experiments, various involuntary drug experimentation on U.S. citizens, and the cover-up surrounding Frank Olson's mysterious death.⁶⁰⁰ All of these examples confirm that government officials authorized devastating human rights abuses. The Phoenix Program in Vietnam confirms that the use of interrogation can obliterate humanitarian rights in a war zone, and CIA and Pentagon covert operations to train interrogation in Latin America were egregious.⁶⁰¹ If life-threatening physical brutality in these cases was indispensable to attaining useful intelligence, then perhaps the *Kubark* psychological interrogation methods are not so effective.

597. See *supra* Parts III(B)(2)(b), III(B)(5)(a), IV(A).

598. See *supra* Parts I, III(A)-(B), IV(A)(1).

599. See *supra* Part III(B)(4)(a).

600. See *supra* Parts III, IV(A)(4).

601. See *supra* Part V.

Given the CIA's history with these programs, the detrimental impact on detainees, overuse of interrogation on anyone remotely suspected of wrongdoing, and prohibitions under domestic and international law, it is difficult to conceive that they are justified under a cost-benefit analysis. Perhaps even worse is that the CIA does not demonstrate much remorse for its history.⁶⁰² Extensively documented books followed congressional investigations, but neither criminal charges nor further investigations were undertaken.⁶⁰³ CIA Officer Colonel White, who directed the MK-Ultra program after Helms became director of the CIA wrote a letter to Dr. Gottlieb upon his retirement in 1972, "I toiled wholeheartedly in the vineyards because it was fun, fun, fun! . . . Where else . . . could a red-blooded American boy lie, cheat, rape and pillage with the sanction and blessing of the All-Highest?"⁶⁰⁴

602. MCCOY, *supra* note 59, at 69-70, 151-87.

603. *Id.* at 69-70.

604. STREATFEILD, *supra* note 141, at 87; JEFF E. SMITH, HAARP: THE ULTIMATE WEAPON OF THE CONSPIRACY 135 (1998).