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Jack Bauer and the Rule of Law: The Case of Extraordinary Rendition

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Abstract

This Essay examines the Bush Administration's use of a tactic in the "War on Terror" called "extraordinary rendition." The term extraordinary rendition refers to the process by which alleged terrorists are captured by the U.S. Government, transferred to another country, interrogated, and possibly tortured—all without judicial involvement—so the U.S. Government may attempt to uncover possible terrorist activity. Extraordinary rendition thus differs from ordinary forms of rendition, since the latter refers broadly to any circumstance where a government takes or transfers custody of a person by means of procedures outside those of extradition treaties.

JACK BAUER AND THE RULE OF LAW: THE CASE OF EXTRAORDINARY RENDITION

*James R. Silkenat & Peter M. Norman**

This Essay examines the Bush Administration's use of a tactic in the "War on Terror" called "extraordinary rendition." The term extraordinary rendition refers to the process by which alleged terrorists are captured by the U.S. Government, transferred to another country, interrogated, and possibly tortured—all without judicial involvement—so the U.S. Government may attempt to uncover possible terrorist activity.¹ Extraordinary rendition thus differs from ordinary forms of rendition, since the latter refers broadly to any circumstance where a government takes or transfers custody of a person by means of procedures outside those of extradition treaties.²

Within academia, issues like extraordinary rendition are often framed as moral dilemmas. As legal practitioners writing for an academic setting, therefore, we would be wise to begin by examining moral dilemmas generally. We begin by noting that they are a common teaching technique. Anyone who has taken an introductory philosophy class in college will recognize the following exotic hypothetical scenarios:

(1) Your best friend knocks on your door, tells you that he is being chased by police, and asks to hide with you. He doesn't explain why he is being chased. You let him in and, a few minutes later, you hear a knock on the door. It's the police, asking whether you know where your friend is. Do you lie to save your friend or tell the truth out of respect for the legitimacy of police authority?

(2) A baby is about to crawl onto a button that will detonate a chemical weapon that, in turn, would cause millions to experience extreme and incurable, but not fatal, illness. The only

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1. *See generally* ASS'N OF THE BAR OF THE CITY OF N.Y., TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" (2004) [hereinafter TORTURE BY PROXY].

2. *See id.* at 5.

hope to stop her is to shoot her with a high-powered rifle. Do you shoot the baby?

Philosophy professors understand (we hope) that their students will never face moral dilemmas as stark as these. In the world of philosophy classes, these dilemmas are supposed to be “unrealistic” so that they can illustrate an abstract concept in the purest possible way. Typically, these moral dilemmas are so highly structured that there are no creative or otherwise “smart-alecky” ways to escape from choosing among pre-selected options: in the first case, no, the student cannot choose to be silent rather than lie or tell the truth; in the second case, the student is not allowed to shoot in front of the baby, to scare him away from the button.

A second property of moral dilemmas is that, once we suppress our “smart-alecky” impulses and accept the rules of the game, they are emotionally compelling. In the Academy Award winning movie *Sophie's Choice*, the heroine is told by a Nazi guard that she must choose which of her two children will live and which will die.³ If she cannot choose, both of them will be murdered.⁴ In the film version of *Les Misérables*, Jean Valjean is an ex-convict who years ago broke his parole and has since built a new life as an honest man and a philanthropist.⁵ When a vagrant and petty thief is captured and wrongly identified as him, however, Valjean must decide whether to turn himself in to the police, and thus endanger those who depend upon him for their livelihood, or to keep silent and let another, perhaps unworthy, man go to jail in his place.⁶ In the more recent, albeit less high-brow, movie *The Devil's Advocate*, Keanu Reeves plays a lawyer who must choose between professional duties and personal ambitions, on the one hand, and emotional commitments and his individual sense of justice on the other.⁷

Of all the various forms of moral dilemmas, Americans have always had a particular soft spot for the “mad bomber” scenario, where the hero has only days/hours/seconds to find the loca-

3. See *SOPHIE'S CHOICE* (Universal Pictures 1982).

4. See *id.*

5. See *LES MISÉRABLES* (Columbia Pictures 1998).

6. See *id.*

7. See *THE DEVIL'S ADVOCATE* (Warner Bros. Studios 1988).

tion of a bomb, known only to a suspect in custody.⁸ Does the hero torture the suspect in hopes of finding the bomb? Until recently, the most famous example of such dilemmas appeared in *Dirty Harry*, the 1971 film in which Clint Eastwood, as the title character, tortures a serial killer in order to make him reveal the location of a captive child.⁹ Because of Harry's tactics, a court later throws out evidence against the killer and releases him back into the public.¹⁰ This particular conceit, the battle between the solitary hero and the conformist bureaucrats who try to stop him, has become a fixture of post-*Dirty Harry* action movies.¹¹

Today, of course, we have an entire banquet of mad bomber scenarios, courtesy of Jack Bauer and friends, from the first several seasons of the television show *24*.¹² Here is a partial list of the scenarios where characters, good and evil alike, resort to torture in order to elicit needed information:

(1) Season 2, Episodes 11 & 12 (6:00–8:00 p.m.): National Security Advisor Roger Stanton is arrested for treason and interrogated after President David Palmer finds evidence that Stanton is part of a plot to detonate a nuclear bomb over Los Angeles, and that he knows the location of the bomb. During the interrogation, a Secret Service agent places Stanton's feet in a bucket of water and electrically shocks him with what appears to be a defibrillator. The torture lasts approximately forty-five minutes in the show's chronology.¹³

(2) In the same episodes, terrorist suspect Syed Ali, also a conspirator in the Los Angeles bombing, is interrogated by Jack Bauer. He is beaten in the head and stomach and forced to watch a staged video of his eldest son being shot to death.¹⁴

(3) Season 2, Episode 19 (2:00-3:00 AM): Jack Bauer is captured by the underlings of a war profiteer. The torturers be-

8. See, e.g., *MAN ON FIRE* (Fox 2000 Studios 2004); *THE SIEGE* (20th Century Fox 1998)

9. *DIRTY HARRY* (Warner Bros. Studios 1971).

10. *Id.*

11. See, e.g., *ABOVE THE LAW* (Warner Bros. Studios 1988); *DIE HARD* (20th Century Fox 1988); *FIRST BLOOD* (Carolco Pictures 1982).

12. *24* (Fox Broad. Co. 2001-2007).

13. *24: Day 2: 6:00 p.m. - 7:00 p.m.* (Fox Broad. Co. television broadcast Feb. 4, 2003); *24: Day 2: 7:00 p.m. - 8:00 p.m.* (Fox Broad. Co. television broadcast Feb. 11, 2003).

14. *Id.*

lieve that he knows of the location of a computer chip that contains evidence that, if revealed, would prevent the war they want to incite. He is stripped naked, gagged, and then cut in the lower stomach with a surgeon's scalpel. When he faints, he is awakened with a harsh chemical agent and then burned in the lower stomach with acid.¹⁵

(4) Season 3, Episode 7 (7:00-8:00 PM): Gael, a Counter Terrorism Unit ("CTU") agent, is suspected of working as a mole for a drug cartel. CTU believes he can lead them to the drug cartel. During interrogation, he is injected in the neck with an unknown substance, which appears to cause him great pain.¹⁶

(5) Season 4, Episode 8 (2:00-3:00 PM): Sarah, a CTU employee, is wrongly accused of being a mole for a terrorist group. CTU believes she is the only one who can prevent a meltdown at six nuclear plants. She is taken into interrogation and repeatedly shocked with a taser. At the end of the episode, she is carried out of the room in a wheelchair, unconscious. The interrogation takes place over approximately forty-five minutes.¹⁷

Meanwhile, real-life variations of mad bomber scenarios are also unfolding according to their own chronologies. In the case of extraordinary rendition, we might be drawing near the series finale.

The best evidence available to the public indicates that the U.S. Government has engaged in a program of extraordinary rendition since the Clinton Administration, and that the Bush Administration expanded and emboldened this program after September 11, 2001.¹⁸ Journalists and human rights activists estimate that the number of people transferred to other countries under the program could number several hundred.¹⁹ While the Bush Administration enjoyed popular support and the Republican Party controlled the U.S. Congress, the public had little

15. 24: *Day 2: 2:00 a.m. - 3:00 a.m.* (Fox Broad. Co. television broadcast Apr. 15, 2003).

16. 24: *Day 3: 7:00 p.m. - 8:00 p.m.* (Fox Broad. Co. television broadcast Dec. 9, 2003).

17. 24: *Day 4: 2:00 p.m. - 3:00 p.m.* (Fox Broad. Co. television broadcast Feb. 7, 2005).

18. See Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, 108-09.

19. See *id.* at 107.

more than scattered evidence concerning what the program was and who ran it. The recent change of control of both Houses of the U.S. Congress, however, might turn a spotlight on the Administration's policies. Democratic Senators Patrick Leahy (D-Vt.) and Carl Levin (D-Mi.), Chairmen of the Senate Judiciary Committee and the Senate Armed Services Committee, respectively, have both announced that they will begin hearings on the Bush Administration's use of interrogation tactics, including extraordinary rendition.²⁰ During 2007, it is likely that the U.S. public will confront some of the government agents who made their own decisions regarding the fate of "mad bombers" and, as reports increasingly make clear, a large number of "not-so-mad" innocent bystanders.²¹

This Essay addresses questions that are likely to emerge from any public debate over extraordinary rendition. First, is extraordinary rendition illegal? This Essay shows that there is a growing consensus among legal scholars that extraordinary rendition violates both U.S. law and international treaty responsibilities. Second, if extraordinary rendition is illegal, how should we treat those who engaged in this tactic? Are these government agents real-life Jack Bauers, or are there other issues involved?

I. EXTRAORDINARY RENDITION IS ILLEGAL

Both practicing lawyers and legal academics understand that controversial legal questions rarely have clear answers. Extraordinary rendition should be an exception. There are plenty of good reasons to believe that extraordinary rendition is illegal and no good reasons to believe it is legal.

The legal arguments against extraordinary rendition have already been elaborated elsewhere, specifically in the report *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition,"* produced jointly by the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice at New York University.²²

20. See Guy Dinmore, *Pressure Grows on U.S. Rendition Policy; U.S. Congress, Now Under Democratic Control, is Set to Ask Awkward Questions*, FIN. TIMES (London), Nov. 21, 2006, at 6; Jim Kuhnhehn, *Dems Prepare Slew of Oversight Hearings*, WASHINGTONPOST.COM, Jan. 6, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/06/AR2007010600518.html> (last visited Apr. 19, 2007).

21. See *Torture by Proxy*, *supra* note 1, at 9-12.

22. *Id.* See generally Jordan L. Paust, *Executive Plans and Authorizations to Violate Inter-*

First, extraordinary rendition in cases where the suspect is apprehended at a U.S. airport or other immigration checkpoint is clearly governed by and normally a violation of the Foreign Affairs Reform and Restructuring Act (“FARRA”) of 1998.²³ Under FARRA:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.²⁴

Where a domestic U.S. Government agency, such as the Justice Department or the Department of Homeland Security, apprehends someone without formally charging the person with links to terrorism, FARRA is, in fact, the final word.

In the case of those persons who might plausibly have ties to terrorism and who are apprehended at a U.S. airport or other checkpoint, the law allows the government some discretion. Under FARRA, members of certain classes of non-citizens identified in the Immigration and Naturalization Act, such as Nazi war criminals and persons designated by the Attorney General as threats to national security, may be turned over to other governments, even if there is reason to believe they will be tortured.²⁵ The “national security threat” exception specifically allows the Attorney General to exclude from FARRA protection those suspected of engaging in terrorist activity.²⁶ As *Torture by Proxy*

national Law Concerning Treatment and Interrogation of Detainees, 43 COLUM. J. TRANSNAT'L L. 811 (2005) (arguing that the Bush Administration planned to violate customary and treaty-based international law and that these violations should have criminal implications); David Weissbrodt & Amy Berquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006) (describing human rights implications of extraordinary rendition and other extralegal rendition methods); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. (forthcoming 2007) (working paper, N.Y. Univ. Sch. of L. Pub. L. & Legal Theory Research Paper Series, Working Paper No. 06-36), available at <http://ssrn.com/abstract=945711> (determining that extraordinary rendition violates international legal norms and U.S. constitutional protections).

23. Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”), Pub. L. No. 105-277, Div. G, § 2242, 112 Stat. 2681-764, 822 (codified as amended in scattered sections of 8 U.S.C.).

24. *Id.* § 2242(a), 112 Stat. 2681-822.

25. See 8 U.S.C. § 1227(a)(4)(D), 1231(b)(3)(B) (2006).

26. See *id.* § 1227(a)(4)(B).

notes, however, even those persons specifically identified by the Attorney General as national security threats “are able nonetheless to apply for a *deferral of removal* . . . which provides protection from transfer.”²⁷

In practice, however, the minimal protection of the deferral process has not been available to some captured suspects. The case of Maher Arar, a Canadian citizen of Syrian descent, is a prime example.²⁸ Arar was returning to Toronto after vacationing with family in Tunisia, when he was apprehended in New York during a flight layover.²⁹ Based on circumstantial evidence connecting Arar with the brother of a man tied to terrorist organizations, Attorney General John Ashcroft approved the Justice Department’s request to transfer Arar to Syria.³⁰ At that point, the law should have allowed Arar to apply for a deferral, but he was never given that opportunity. Arar was flown to Jordan, where he was beaten by local police and then sent by van to Syria, where he was further tortured.³¹ He remained in a Syrian prison for a year and a half before the Canadian Government intervened to have him released.³² Arar was never charged with any offense, and was subsequently cleared by Canadian courts of all ties with terrorist organizations or activities.³³

In cases where a suspect is apprehended in another country, such as those of Ahmed Agiza and Mohammed al-Zari in Sweden and Hadj Boudella in Bosnia,³⁴ FARRA appears to have been ignored, despite the language indicating that it applies regardless of whether or not the suspect is physically present in the United States. As the authors of *Torture by Proxy* note, the agencies that would have been in charge of extraordinary renditions that originated abroad, especially the Central Intelligence Agency (“CIA”), have not publicly issued any of their own regulations.³⁵

27. *Torture by Proxy*, *supra* note 1, at 21 (emphasis in original).

28. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006).

29. *See id.* at 252-53.

30. *See id.* at 254.

31. *See id.* at 254-55.

32. *See id.* at 255.

33. *See Mayer*, *supra* note 18, at 106; *see also* COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 13-14 (2006), *available at* <http://www.ararcommission.ca/eny/26.htm>.

34. *See Mayer*, *supra* note 18, at 118, 123.

35. *See Torture by Proxy*, *supra* note 1, at 26, 30.

Thus, there is no indication that the CIA has any procedure for appealing its conclusion that an individual is a national security threat or for allowing any sort of deferral analogous to those offered by domestic agencies. It is possible that the CIA has issued its own secret regulations pursuant to FARRA. If it has, these secret regulations themselves must not contradict the law. FARRA requires that in all cases, even when dealing with suspected terrorists, U.S. Government actions must be consistent with the “obligations of the United States under the [U.N. Convention against Torture], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.”³⁶

FARRA was enacted in order to implement the United States’ obligations under the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”).³⁷ International law scholars argue that the United States has systematically misinterpreted these obligations and its related obligations under the International Covenant on Civil and Political Rights (“ICCPR”).³⁸ The primary issue scholars raise is that of territoriality: Do these human rights treaties only apply to persons within a signatory’s physical territory? The United States has long maintained that its reservations to these treaties specifically limit their scope to territory under U.S. jurisdiction. Administration lawyers are now applying this traditional reservation to the problem of extraordinary renditions.³⁹

As Margaret Satterthwaite points out in her article, *Rendered*

36. Foreign Affairs Reform and Restructuring Act (“FARRA”) of 1998, Pub. L. No. 105-277, Div. G., § 2242(c), 112 Stat. 2681-764, 822 (codified as amended in scattered sections of 8 U.S.C.).

37. U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”), Dec. 10, 1984, 112 Stat. 2681, 1465 U.N.T.S. 85.

38. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; see, e.g., Kristen D.A. Carpenter, *The International Covenant on Civil and Political Rights: A Toothless Tiger?*, 26 N.C. J. INT’L L. & COM. REG. 1 (2000) (arguing that “American courts are not truly interpreting the international covenant, but assume its protections to be coextensive with those already provided by the American Constitution.”); John Fitzpatrick, *The Unreality of International Law in the United States and the Lagrand Case*, 27 YALE J. INT’L L. 427, 428 (2002); Margaret Thomas, *“Rogue States” within American Borders: Remediating State Noncompliance with the International Covenant on Civil and Political Rights*, 90 CAL. L. REV. 165 (2002) (arguing that “Congress has yet to enact legislation implementing the Treaty nationally, and courts and state legislatures have paid scant attention to the document.”).

39. See Satterthwaite, *supra* note 22, at 16.

Meaningless, the territoriality argument is a red herring. Satterthwaite gives as an example the *travaux préparatoires* of the ICCPR and CAT, and finds that they do not support the Administration's argument. The *travaux* indicate that the United States argued for a territorial limitation on its obligations because it did not want to be put in a position where its treaty obligations would require it to enter the jurisdiction of another sovereign State in order to prevent human rights abuses.⁴⁰ This seemed like a violation of the traditional concept of State sovereignty and a requirement that the United States act as a global police force. Such sovereignty concerns do not apply in cases of extraordinary rendition. In such cases, the United States has already entered another territory and has already taken a suspect into custody. Any violation of sovereignty has already occurred. Applying the territorial argument to extraordinary rendition would essentially allow the United States to circumvent its normal obligations under human rights law by preemptively violating other norms of international law.⁴¹

The case of Abu Omar, an Egyptian-born resident of Italy, provides a good example of the difficulty of applying the territoriality argument to extraordinary rendition. In 2003, Abu Omar was abducted by the CIA, in violation of Italian law, and taken to Egypt to be tortured.⁴² Subsequently, an Italian judge issued arrest warrants for the CIA agents involved in the abduction, charging them with kidnapping.⁴³ Under the current Administration's interpretation of the territoriality rule, Abu Omar, once illegally abducted from Italy, was not entitled to protection under the ICCPR or CAT because such protection might require the United States to entangle itself in the internal affairs of another country.⁴⁴

Satterthwaite and the authors of *Torture by Proxy* argue that all but the most cynical readings of U.S. treaty obligations compel us to conclude that extraordinary rendition violates recognized standards of international law. In the coming year, congressional hearings may confirm the arguments of many legal experts outside the Bush Administration—that the actual poli-

40. *See id.* at 16-17.

41. *See id.* at 22.

42. *See id.* at 7-8.

43. *See id.* at 7.

44. *See id.*

cies followed by the CIA and other agencies with regard to extraordinary rendition violate U.S. domestic law.

II. *EXTRAORDINARY RENDITION IS NOT A 24 PLOT*

If extraordinary rendition is in fact contrary to U.S. and international law, we seem to be roaring along toward our *24*-like cliffhanger: should our heroes break the law to save thousands of innocent lives or uphold the law for the protection of people who might be terrorists? One can picture the climax, where the grizzled, world-weary CIA agent confronts the bleeding-heart human rights activists and timid government bureaucrats on the U.S. Senate Committee and explains to them how the world really works.

In our rush to find an agonizing moral dilemma, though, we should not confuse the reality of extraordinary rendition with the scripted world of *24*. Accepting that in both the show and the real world, torture is illegal, we should now point out some of the differences between these two worlds.

In the television show, Jack Bauer acts as a lone wolf, with a handful of loyal supporters. In fact, many of the show's subplots describe his struggles with CTU, the agency with which he is nominally affiliated. During the torture of Syed Ali, for example, he violates a direct order from the President of the United States to scale back his interrogation tactics.⁴⁵ In reality, extraordinary rendition requires coordinated action of different government agencies, regularized practices, and some degree of institutionalization. The CIA must hire chartered jets, set up dummy companies, arrange to use U.S. military facilities, divert agents from their normal duties, find competent translators, develop relationships with non-U.S. intelligence bureaus, pay support staff, and, of course, implement highly structured and precise procedures for keeping all of these actions secret. As former CIA Agent Dan Coleman told the *New Yorker*, referring to ex-

45. See *24: Day 2: 6:00 p.m. - 7:00 p.m.* (Fox Broad. Co. television broadcast Feb. 4, 2003); *24: Day 2: 7:00 p.m. - 8:00 p.m.* (Fox Broad. Co. television broadcast Feb. 11, 2003). It is true that in later seasons, Counter Terrorism Unit ("CTU") itself engages in torture. In two cases, both involving internal moles within CTU, torture scenes do seem to follow some sort of government protocol. See *24: Day 3: 7:00 p.m. - 8:00 p.m.*, *supra* note 16; *24: Day 4: 2:00 p.m. - 3:00 p.m.*, *supra* note 17. The show does not address the implications for workplace morale of having a standing policy of torturing one's own employees for alleged disloyalty.

traordinary rendition, “[t]orture . . . has become bureaucratized.”⁴⁶

The bureaucratization of extraordinary rendition entails an entire set of potential dysfunctional consequences that are invisible under the normal “mad bomber” scenario. Bureaucracies create incentives for careerist behavior such as hiding mistakes and staying with bad decisions in order to avoid damaging one’s reputation.⁴⁷ In his book *State of War*, journalist James Risen suggests that such incentives have already affected the extraordinary rendition program:

One CIA officer, haunted by what he saw in one particular rendition, described the case to the author. This officer alleged that the CIA flew a prisoner from Afghanistan to a country in the Persian Gulf—where he was to be turned over to local authorities and imprisoned again—despite knowing that he was an innocent man who had been wrongly identified as a terrorist. The CIA officer said he believed that the CIA was moving the prisoner in order to hide its mistake.⁴⁸

Mistakes like these, involving the imprisonment of innocent people, are particularly tempting to hide because the very secrecy of the program ensures that no one outside the government, and very few within it, will ever have standing to question the guilt of these people. This perhaps explains why Maher Arar, the Canadian citizen, was imprisoned in Syria for over a year and a half after sustained torture and other interrogation indicated that he had nothing to offer the authorities.

During the Bush Administration, the dangers of bureaucratization have been doubled by what Risen, Seymour Hersh, and others describe as the politicization of the intelligence community. Risen describes the process in the context of intelligence concerning the Iraq War: “Agency officials who appeared to be unenthusiastic about Iraq soon mysteriously found themselves sidelined, while their more eager and ambitious colleagues began to rise, both within the Directorate of Operations and in the

46. Mayer, *supra* note 18, at 110.

47. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 992 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al., trans., 1968) (“Bureaucratic administration always tends to exclude the public, to hide its knowledge and actions from criticism as well as it can.”).

48. JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* 34 (2006)

Directorate of Intelligence, the analytical arm.”⁴⁹ In the case of extraordinary rendition, as well as U.S.-based examples of extreme interrogation, such a system of incentives might effectively create a market failure in the intelligence community. As we will examine in more detail below, interrogation under pain of torture has an ability, unparalleled by other methods of intelligence gathering, to confirm the prejudices of the interrogators. In an environment where one’s superiors want information that will reinforce their own views, torture has a distinct advantage over, for example, forensics. Thus, tactics such as extraordinary rendition and extreme interrogation begin to out-compete other forms of intelligence, not on the basis of their utility, but on the basis of their political expediency.

Extraordinary rendition also differs from the plots of *24* in terms of their respective timing. In the show, there are only hours or even minutes left to find the one crucial piece of intelligence. In reality, detainees are often tortured for months, without reference to any specific terrorist plot. Although we cannot know for sure whether extraordinary rendition has succeeded in stopping any mad bombers—since the program’s successes, as well as its failures, would presumably be secret—we have at least two good reasons to believe such instances are rare or non-existent. First, the experience of other Western democracies suggests that this is the case. Tom Parker, a former officer for the British security agency known as “MI5,” reported the following to Jane Mayer of the *New Yorker*:

[Regardless of the effectiveness of torture] a larger problem is that many detainees have “nothing to tell.” For many years . . . British authorities subjected members of the Irish Republican Army to forceful interrogations, but, in the end, the government concluded that “detainees aren’t valuable.” A more effective strategy . . . was “being creative” about human intelligence gathering, such as infiltration and eavesdropping.⁵⁰

Second, the nature of the threat from Islamic terrorist organizations has changed in the five years since September 11, 2001. Seymour Hersh argues that since the War in Afghanistan, the Al Qaeda organization—with its budget, training camps, and orga-

49. *Id.* at 76.

50. Mayer, *supra* note 18, at 117.

nizational hierarchy—has largely disbanded.⁵¹ In its place are discrete and essentially unaffiliated cells that take on the Al Qaeda “brand name” and engage in the tactics of “leaderless resistance” such as copycat actions.⁵² Interrogations are typically of limited use against leaderless resistance cells, because no one person is likely to be privy to the plans of those in other cells.

Ironically, considering that its advocates justify extraordinary rendition on grounds of urgency, CIA insiders predict that any given rendition might commit resources and personnel for years into the future. According to Jamie Gorelick, a former Deputy Attorney General and member of the 9/11 Commission, suspects who are rendered over to other governments and tortured cannot be reincorporated into the U.S. justice system by means of criminal prosecution, since much of the evidence obtained from them would be inadmissible.⁵³ Because the CIA has a great incentive to keep rendered prisoners—including innocent ones—out of the public eye, it must either convince governments to hold onto them on assurance of secrecy (which may, increasingly, give these governments political leverage over the United States) or make plans to get into the prison business for decades to come. As Gorelick argues: “In criminal justice, you either prosecute the suspects or let them go. But if you’ve treated them in ways that won’t allow you to prosecute them you’re in this no man’s land. What do you do with these people?”⁵⁴

Finally, the torture that occurs on 24 typically yields fast, actionable intelligence, and frequently leads to no long-term consequences to the victim. In Season Four, Sarah, wrongly accused of being a “mole” and tortured with electric shocks, even accepts an apology from CTU and an invitation to rejoin the agency.⁵⁵ In countries such as Syria, Egypt, and Thailand that have re-

51. See SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 92 (2004).

52. See Simson L. Garfinkel, *Leaderless Resistance Today*, FIRST MONDAY, Mar. 2003, http://www.firstmonday.org/issues/issue8_3/garfinkel/ (last visited Apr. 19, 2007). *But see* Mark Mazzetti & David Rohde, *Signs of Qaeda Resurgence*, INT’L HERALD TRIB., Feb. 19, 2007, at 1 (reporting that Al Qaeda has been regrouping and growing in northern Pakistan).

53. See Mayer, *supra* note 18, at 108.

54. *Id.*

55. 24: *Day 4: 4:00 p.m. – 5:00 p.m.* (Fox Broad. Co. television broadcast Feb. 21, 2005).

ceived rendered prisoners from the United States, the intelligence outcome of torture is less certain, but the impact on victims is certainly more profound.⁵⁶

Concerning the effectiveness of torture, Fred Kaplan has noted that “[l]iberals have a tendency to accept, all too eagerly, the argument that torture is ineffective, that it doesn’t yield useful information, that a tortured detainee will tell his inquisitors whatever they want to hear.”⁵⁷ On the other hand, hard data concerning the effectiveness of torture is also hard to come by. In a recent column in the *Washington Post*, Anne Applebaum cites a study by French academic Darius Rejali, who recently trolled through French archives concerning the war with Algerian rebels and found no clear examples of how torture helped the French.⁵⁸ Applebaum also refers to, as anecdotal evidence, the statements by U.S. interrogators in Vietnam who avoided torture because they found it ineffective and even counterproductive, despite pressure from their superiors for immediate results.⁵⁹ Similarly, Jane Mayer cites a former British military interrogator who regards torture as useless for various reasons.⁶⁰ Of course, this anecdotal evidence must be taken with a grain of salt: U.S. interrogators who did find torture effective are unlikely to go public with the fact.

In her book *The Body in Pain*, Elaine Scarry offers one intuitively plausible explanation for why torture can seem so simultaneously effective and ineffective.⁶¹ *The Body in Pain*, it should be noted, is concerned with truly unrestrained examples of torture, such as the application of a dentist’s drill to a nerve for four hours a day for twenty-nine straight days.⁶² Such tactics are likely similar to those experienced by contemporary prisoners in Syria or Egypt. In these cases, the purpose of the torture is to inflict

56. 24, for all of its graphic realism, has never depicted one of the principal weapons of all of these regimes: sexual abuse. See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT 2005 (Mar. 8, 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61687.htm> (last visited Mar. 30, 2007).

57. Fred Kaplan, *Does Torture Work?*, SLATE, Sep. 14, 2004, <http://www.slate.com/id/2106702> (last visited Apr. 19, 2007).

58. See Anne Applebaum, *The Torture Myth*, WASH. POST, Jan. 12, 2005, at A21.

59. See *id.*

60. See, e.g., Mayer, *supra* note 18.

61. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

62. *Id.* at 34.

pain so unbearable that it destroys the victim's entire mental world, including not only political allegiances, but all loves, loyalties, and trust, including love and trust of oneself. Scarry states: "The [interrogator's] very question that, within the political pretense, matters so much to the torturer that it occasions his grotesque brutality will matter so little to the prisoner experiencing the brutality that he will give the answer."⁶³ Of course, at this point, the distinction between truth and lies matter equally little to the prisoner. As torture destroys one's ability to lie, it also destroys one's inner allegiance to the truth. To drive her point home, Scarry quotes the slogan of a South Vietnamese torturer: "If you are not Vietcong, we will beat you until you admit you are; and if you admit you are, we will beat you until you no longer dare to be one."⁶⁴ The problem is not that torture cannot produce truth, but that it is extremely difficult—not only to the torturer but also to the victim—to distinguish what is a confession and what is a convenient lie.

In 24, the extremeness of torture is separated from its effectiveness. No matter how ferocious the actual interrogation is, it never advances to the level of complete destruction of one's inner world. Typically, in the real-time conceit of the show, an interrogation will take, at most, an hour (of which, less than two minutes is actually shown on the screen). After the interrogation ends, the victim has usually given up the appropriate information, but the victim's world and dignity are left intact to such an extent that the victim not only forgives but continues working with the torturer. Under such completely unrealistic circumstances, it is possible to imagine that torture does have primarily an information gathering function, and that however brutal it appears, it is but a temporary, emergency blip in the lives of its participants.

As Scarry argues, the really naïve people are not those who doubt torture's effectiveness at revealing true information (although they might be at least partially incorrect), but those who think torture is always motivated primarily by a desire to reveal information or that revealing information is its most important consequence. Scarry says: "It is crucial to see that the interrogation does not stand outside an episode [of torture] as its motive

63. *Id.* at 29.

64. *Id.* at 42.

or justification: it is internal to the structure of torture, exists there because of its intimate connections to and interactions with the physical pain.”⁶⁵ Even when the prisoner has little or no valuable information and the torturer has complete control over the prisoner’s body, the torturer’s “need-to-know” preserves the fiction that there is still, between the two, a battle of wills. Of course, the outcome of this battle is preordained: the prisoner will be broken. The point of the whole exercise is to create an illusion that the torturer, and the regime he represents, has the power to reach into even the deepest recesses of one’s mind.⁶⁶ Therefore, it should not be surprising that torture occurs most commonly when the self-image of a regime is most unstable. Under such circumstances, torture either tends to push out other, possibly more effective, methods of intelligence gathering, or those other methods are deployed primarily in the service of collecting torture victims.

III. *EXTRAORDINARY RENDITION UNDERMINES THE RULE OF LAW*

Despite all evidence to the contrary, it remains theoretically conceivable that a lone wolf hero might engage in restrained torture for the sole sake of extracting information that is needed to avert an imminent attack. Yet, to accommodate what must be extremely rare occurrences, the U.S. Government has established a standing bureaucracy. Press reports indicate that the government has procured airplanes, arranged for and made routine special procedures for transporting detainees, and assigned trained government agents to oversee extraordinary rendition operations. We can guess that it has also developed standard procedures for parsing the information supplied by governments and has worked with torturers to draw up goals and strategies for interrogations. This is one of the things that is most alarming about extraordinary rendition: Not only have human

65. *Id.* at 29.

66. The power is illusory for two reasons: (1) the real power over the individual comes from within—from the body’s own capacity to create pain—without which the torturer’s efforts would be pointless, except as a particularly inefficient way of injuring the victim; and (2) the exercise of inflicting pain on a prisoner who is at one’s complete mercy is, logistically speaking, not that difficult. States, private groups, and even individuals who lack the resources to wage open warfare nonetheless can build, equip, and staff fully functional torture chambers.

rights standards broken down in emergency situations, but the violation of these rights has, in contradiction of U.S. law, become institutionalized—with a chain of command, a budget, and all the trappings of bureaucracy.

Only when we understand how implausible the picture of the principled, driven lone wolf truly is can we turn back to consider what should happen in a “mad bomber” moral dilemma. Most of us do not have much intuitive sympathy for the rigid moral position that one should never violate a legitimate law, no matter what the consequences. Most people would think twice about opening themselves up to a friend who would give away their hiding place to avoid lying to the police. If the genuine, industrial-strength Jack Bauer situation occurred—if, for example, if one knew for certain that millions would die unless one tortured an individual who was likely a bad person himself—most people would find a purely moralistic view oppressive.

Additionally, it is reasonable to speculate that most people would agree that breaking a legitimate law for a good reason should not excuse a person from the law’s consequences. This is the nature of civil disobedience. When Martin Luther King, Jr.’s Southern Christian Leadership Conference was organizing direct action protests in Birmingham, Alabama, its leaders repeatedly asked themselves: “Are you able to endure the ordeal of jail?”⁶⁷ Ministers, mothers, students, and low-wage laborers all were able to say “yes.” It is fair to say that those who did spend time in jail as a result of their involvement in the civil rights movement today wear their sentences as a badge of honor and a sign of their convictions.

If an instance of torture is morally necessary to save a large number of people, then the would-be torturer should be required to ask himself the same question. Jack Bauer (or his real-world equivalent) should be capable of exhibiting the same courage as elderly women did in the civil rights movement. In the case of systematic violations of the law, such as those that evidently have occurred during the program of extraordinary renditions, the leaders who ordered these programs and who had knowledge of the violations similarly ought to have asked themselves the question: “Are you able to endure the ordeal of

67. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 80 (1964).

jail?"⁶⁸ Investigations will reveal to the public whether their violations of law served justice and humanity. If they did, then they too can wear their convictions as a badge of honor. But U.S. Government leaders, for their role in furthering and promoting extraordinary renditions as a way to avoid constitutional and other legal requirements, should not.

68. *Id.*