IN AN ARTICLE TITLED “On the Moral Implications of Torture and Exemplary Assassination,” intelligence and research specialist Paul Blackstock shares a story from the Algerian War, where both the French and the Algerians were often accused of torture. It indicates the impact torture may have:

The Captain’s Dilemma

A French captain, who was opposed to torture because he was a devout Catholic, was faced with a dilemma. A known terrorist had been captured and reliable sources informed the captain that this man had planted a bomb that would go off at noon the next day, probably killing French officers and wounding others. Time was running out. Should he order the torture needed to obtain the location of the bomb? He worried and worried over this decision and finally, ordered the use of the torture and the bomb was neutralized. The next day the captain committed suicide.

Blackstock writes: “The use of torture has very real and damaging effects on private individuals who employ such means, as well as feedback effects on the society from which they came.” One can only speculate what the impact will be on the soldiers who committed the acts at the Iraqi prison of Abu Ghraib, as well as the feedback effects of these acts on American society. The consequences of their actions are likely to be long lasting.

What is Torture?

Torture is something that we typically think would not be perpetrated by Americans, but is carried out by repressive foreign governments. In fact, after the Abu Ghraib photos were made public, Secretary of Defense Donald Rumsfeld, President George W. Bush and other U.S. officials were quick to call the acts “abuses” and refrained from using the term “torture.” No nation wants to be regarded as
As defined in the UN Convention Against Torture, torture is any act which inflicts severe pain or suffering, whether physical or mental, and is intentionally inflicted on a person for such purposes as obtaining information or a confession from him.²

One hundred and thirty countries, including the U.S., have signed this treaty. Torture is also outlawed by the Universal Declaration of Human Rights (Article 5), which states: “No one should be subject to torture or to cruel, inhuman or degrading treatment or punishment.” Additionally, the U.S. Army Manual specifically forbids “the use of force, mental torture, threats, insults or exposure to unpleasant and inhuman treatment of any kind.”³

The U.S. has signed the four Geneva Conventions, which expressly prohibit any kind of physical or psychological coercion and torture or inhuman treatment of prisoners of war.⁴ In 1996, Congress also passed the War Crimes Act to ban all war crimes, which are referred to as grave breaches of the Geneva Conventions.⁵

But does the Geneva Convention apply to the War on Terror? The U.S. government had previously taken the position that such covenants did not apply to the prisoners taken during the war in Afghanistan because it was not a war against a nation but rather against terrorist groups, Al Qaeda and the Taliban (which the U.S. had not recognized as the legitimate government of Afghanistan). The detainees from that war were taken to Guantanamo Bay, Cuba. According to the U.S. government, international covenants do not apply to this U.S. military base, although human rights organizations and others criticize this position. In fact, it should be noted that the Convention Against Torture explicitly says that there are no extenuating circumstances, including war or other public emergency, that can ever be used to justify torture.⁶

U.S. officials have said that the Geneva Conventions do apply to Iraq, as the situation there has resulted from a conventional war.

After September 11
To understand the ongoing debate about the interrogation techniques that should be used on detainees, it is necessary to examine the events of September 11, 2001, and their ramifications. It was after September 11, having suffered terrible attacks on its own soil, that the U.S. government began its “War on Terror.” The goals of this war, according to U.S. officials, were to bring to justice all those responsible for the attacks and also to do everything possible to prevent future attacks. To accomplish both these goals, it soon became clear that the productive interrogation of Al Qaeda members would be needed.

Hundreds of suspects were detained in Afghanistan and taken to Guantanamo Bay. During and after the Iraq War, thousands were detained in Iraq and taken to Abu Ghraib and other prisons there. It was not until very recently that the prisoners in Cuba and the detainees in Iraq were granted access to lawyers or courts. Some of the detainees have been released, but many others have been imprisoned for two years, sometimes even longer. According to U.S. officials, the primary reason for holding these detainees captive has been to prevent future terrorist attacks and to gather intelligence.

The argument used to justify the use of tough interrogation techniques is that the threat of more terrorist attacks is imminent and therefore extraordinary actions must be taken to prevent them. As explained by White House Counsel Alberto Gonzalez in a January 2002 memo, “The nature of the new war places a high premium on other factors, such as the ability to obtain information from captured terrorists and their sponsors, in order to avoid further atrocities against American civilians.”⁷

But not everyone in the government agrees that the War on Terror creates an exception to the interrogation rules established by the international community. A number of military lawyers rejected this line of thinking, believing that overlooking established interrogation methods goes against the fifty-year history of the Geneva Conventions. They put their objections in writing and spoke to a committee of the New York State Bar Association, which was investigating complaints about the policy. The lawyers’ position is that the attorneys in the Justice and Defense Departments are pushing the boundaries of interrogation too far.

The debate over what interrogation methods should be used became public in 2004 when recommendations from a 2002 Justice Department memorandum to the White House became known. In this memo, the Justice Department indicated that Al Qaeda terrorists might be “legally tortured,” in spite of international treaties, the 1996 War Crimes Act and the Army’s Field Manual. The justification was that the “prohibition against torture may not apply in a situation where the president, in his role of commander-in-chief, orders it.” The Justice Department went so far as to say that an interrogation was only torture when it “inflicted pain accompanying a serious injury such as organ failure, impairment of body function or even death.”⁸ After this memo caused a major uproar in Washington, Bush administration officials insisted that the internal Justice Department memo had never been implemented. A military lawyer commented that “the attempt to redefine torture [was] unprecedented.”⁹

Methods of Interrogation
Following the declaration of a war on terror, the first major location for the use of interrogation techniques was the naval base at Guantanamo Bay, often referred to as “Gitmo.” Hundreds of detainees from forty-four different countries were captured during the war in Afghanistan and taken to Guantanamo. At Gitmo, Major General Geoffrey Miller initiated a system of stress and duress interrogations. The different types of practices used included:

- Harsh heat and cold
- Withholding food
- Hooding, for days at a time
- Isolation in cold dark cells for more than 30 days
- Public nudity
- Threatening by dogs
- Limited use of stress positions.

The U.S. government has argued
that helpful intelligence information has come out of Gitmo. Nonetheless, some say the practices being carried out in this prison are in violation of the Geneva Conventions. As previously mentioned, the U.S. government maintains that the detainees are not prisoners of war and therefore not protected by the Geneva Convention.

In February 2002, President Bush said that “new thinking in the law of war” was needed, as this was not a traditional war where the Geneva Conventions would apply. He did, however, go on to say that all prisoners would be treated humanely. But can we call the techniques used at Gitmo “humane”? When questioned about these practices and the practices used at Abu Ghraib, White House lawyer Alberto Gonzales said, “All interrogation techniques have been carefully vetted and are lawful, and do not constitute torture.”

Bush added, “We do not condone torture. We do not condone torture. And a strong U.S. advocacy that a new Iraqi constitution and government should respect human rights, the photos from Abu Ghraib shocked the world. They showed nude inmates being intimidated by unmuzzled dogs, naked detainees piled on top of one another, and nude prisoners being led around on a leash. In visits to prisons and detention centers in Iraq, the International Red Cross had singled out Abu Ghraib for “using public nudity in a ‘systematic’ pattern of maltreatment.”

How could the U.S. military police and intelligence units at Abu Ghraib use such methods? The answer may lie in directives from officials who gave instructions for the police to “soften up the prisoners for interrogation.” These intimidation techniques might have been used to do just that. The Department of Defense and the White House have taken the position that the abuses were the acts of a few soldiers, a few “bad apples.” But two recent reports, one by a panel headed by former Secretary of Defense Donald Rumsfeld (“the Schlesinger Report”) and a second headed by Maj. General George R. Fay (“the Fay Report”) have concluded that much more went on than that.

The Schlesinger Report found that there were 300 cases of alleged abuse, 66 substantiated to date and another 150 still under investigation. Of the 66, 55 were in Iraq, eight in Guantanamo Bay and three in Afghanistan. Five people overall had died during interrogations. The high rate of abuse in Iraq was said to have resulted from poor training and lack of supervision. There were also just not enough military personnel working in Abu Ghraib. There were only 495 detention personnel there, while 1,400 had been authorized. There was a ratio of seventy-five prisoners to every one military police officer while in Guantanamo Bay there was a one-to-one ratio.15

For the first time, the Schlesinger Report pinned the blame higher up the chain of command, laying strong criticism at the feet of military officials both in Iraq and in Washington. The report said that there was inadequate planning for the aftermath of the Iraq invasion, with little anticipation of the strong insurgency which occurred, nor for the resulting broad arrests of people, many of whom were clearly not terrorists. (From October 2003 to February 2004, the prison population in Abu Ghraib grew from 1,000 to 7,000.) “The abuses were not just the failures of some individuals to follow known standards; they are more than the failure of a few leaders to enforce discipline,” the report said. “There is both institutional and personal responsibility at higher levels.”

Secretary of Defense Donald Rumsfeld himself was criticized for establishing interrogation practices in Guantanamo Bay and Afghanistan that carried over into Iraq, even though he had admitted that the Geneva Conventions did apply to the situation there. The Schlesinger Report also cited Rumsfeld for contributing to the confusion regarding what interrogation methods were to be used by issuing conflicting orders.17

General Fay’s report listed the abuses at Abu Ghraib in great detail. These included direct physical assaults, an alleged rape of a female prisoner, and the use of unmuzzled dogs to intimidate youths until they urinated. Fay also made clear that these were not just the acts of low level military police but that more than thirty military intelligence officers were implicated. This report also held General Sanchez, the top commander in Iraq, “responsible for things that did or did not happen.” Also for the first time, a U.S. government official, Fay, admitted, “there were a few instances where torture was being used.”7,8

People concerned with these human rights abuses think that the War on Terror has created a loophole which encourages proceedings that constitute torture. George Soros, the philanthropist and frequent critic of the Bush administration, has said that the War on Terror “is making the victims into the perpetrators.”9 The War on Terror may be contributing to the feeling, among some soldiers, that they are above the law and have the right to torture detainees.

In June 2004, the U.S. Supreme Court ruled in favor of the detainees at Guantanamo on one of their rights. The Court held that prisoners at the prison in Guantanamo Bay, who were classified as “enemy combatants” must be given the right to challenge their detention in a court. Though it is still unclear whether the prisoners at Abu Ghraib could challenge their conditions, military court martials are underway against some of the soldiers for the abuse depicted in the pictures. In addition, the Bush administration has conceded that the detainees in Iraq are prisoners of war and subject to the Geneva Conventions. The U.S. Supreme Court stated in its ruling on the Guantanamo Bay case that “a state of war is not a blank check for the president.”40

Is Torture Ever Justified?

During the past two years, there has been a heated debate among lawyers in the Bush administration as to whether torture could ever be ordered by the president under his commander-in-chief powers. Though the debate has not been fully settled, Bush has emphasized that his administration will never use torture. Nonetheless, the issue of whether torture can ever be legally used may arise again in the future.
Professor Alan Dershowitz of Harvard Law School has argued that there may be times when the government wants, and perhaps needs, to use torture to obtain information to save lives. He says this is not prohibited by the Constitution as long as there are legal safeguards similar to obtaining a search warrant based on probable cause. He calls this a "torture warrant." Some say Dershowitz’s position is not tenable because the U.S. has ratified the Convention Against Torture. But Dershowitz maintains that the Senate’s ratification was accompanied by reservations including the statement that the Convention’s prohibition of “cruel, inhuman or degrading practices” only applies to those practices that violate the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution. Therefore, unless these amendments prohibit torture during interrogations, Dershowitz says, torture might be allowed under certain circumstances. Dershowitz holds that these amendments only restrict the use of evidence at trial, or under the Eighth Amendment, only relate to “punishment after trial.” Dershowitz’s views have sparked much controversy among legal scholars and human rights advocates.

Dershowitz’s critics point to cases where evidence was obtained using force and then dismissed in court. In one case, a court held it wrong for the police to force a person, who was suspected of having swallowed drugs, to take a drug that would cause him to vomit. The U.S. Supreme Court in this and other cases has held that the Fifth Amendment’s due process clause protects against physical abuses that “shock the conscience of the Court.” Dershowitz rebuts this by saying that the Courts have held that involuntary blood tests are allowable because there is “virtually no risk, trauma or pain involved.” Clearly, this is not the same in the case of torture, where pain is part of its very definition.

Those who oppose the consideration of the use of torture as an interrogation method regard it as a slippery slope that can lead to many other abuses. Supreme Court Justice O’Connor has argued, “Because our notions of liberty are inextricably entangled with the idea of physical freedom and self determination, the Court has deemed state intrusion into the body as repugnant to the interests protected by the due process clause.” As another commentator put it, “torture makes choice impossible.”

The Future of Torture
The debate may have subsided for the time being over whether torture should be legal in Afghanistan, Iraq, or Guantanamo Bay, Cuba. However, it is safe to say that as you are reading this article, someone somewhere in the world is being tortured. In light of the fact that the military police charged at Abu Ghraib were ordinary people caught up in an effort to gather information, there is a chance that our students could become either victims of torture or torturers. This is why we must be aware of the issues raised by torture and understand our constitutional protections and international commitments.

Notes
2. Office of the High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December 10, 1984).
6. Office of the High Commissioner for Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December 10, 1984).
8. U.S. Justice Department, Office of Legal Counsel, Memorandum for Alberto Gonzales, Counsel to the President (August 1, 2002).