



What is the Greatest Evil?

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BOOK REVIEW

WHAT IS THE GREATEST EVIL?

THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR. By Michael Ignatieff. Princeton and Oxford: Princeton University Press. 2004. Pp. xii, 212. \$22.95 (cloth).

*Reviewed by Martha Minow**

In *The Lesser Evil: Political Ethics in an Age of Terror*, Michael Ignatieff asks the question that every member of this society should be asking since September 11: how do we combat terrorist threats to our society without destroying the values of our society? We can put the question more formally: how do we protect our constitutional democracy without contravening constitutional and democratic commitments? And we can put the question more personally: how do we ensure our survival and make sure that we are proud of — or at least comfortable with — the *we* that survives?

These are not academic issues. Images of prisoner abuse at the hands of American troops at Abu Ghraib circulate the globe and supply evidence to support the worst charges of American arrogance and depravity. Thus far, the federal judiciary has reaffirmed the requirement of judicial review, though in the most minimal form, of long-term detentions,¹ yet the Bush Administration continues to detain over 1000 individuals without charges in the United States² and approximately

* William Henry Bloomberg Professor of Law, Harvard Law School. Thanks to Yael Aridor Bar-Ilan, Richard Falk, Peter Galison, Jack Goldsmith, Phil Heymann, Elena Kagan, Mary Minow, Joe Singer, and Elizabeth V. Spelman for comments on an earlier draft and further discussions about the issues addressed here. Thanks also to Ken Roth for his expert advice and to Yael Aridor Bar-Ilan, Cori Crider, Isabel Goodman, Samuel Layton, Amy Lehr, and Adel Tamano for research into cruel, inhumane, and degrading treatment under international, U.S., and comparative law.

¹ See *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004) (holding that any person detained in a place controlled by the United States is able to invoke federal judicial review through the U.S. habeas statute); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648–49 (2004) (plurality opinion) (holding that a U.S. citizen alleged to support hostile forces must be given access to a neutral tribunal to challenge his designation by the executive as an enemy combatant and therefore his detention pursuant to a congressional authorization for the use of military force, though noting that, among other things, a rebuttable presumption in favor of the government would not violate the Constitution). *But see id.* at 2651 (noting that a properly constituted military tribunal might satisfy due process requirements). Whether aliens are entitled to the same due process protections as citizens in this context, however, remains unclear.

² The actual number of detainees held by the United States since September 11 is difficult to verify because the government has treated this matter as too sensitive for disclosure. One esti-

550 people at Guantánamo Bay, Cuba.³ The Guantánamo detainees and several hundred others now released have reportedly faced physical and psychological coercion described by International Red Cross observers as “tantamount to torture.”⁴ These are the most controverted antiterrorism actions taken by the United States after September 11, but they are not the only ones that raise the question, what lesser evils may be warranted now?

It may strike some readers as odd that Ignatieff talks of antiterrorism in terms of evil. The revival of “evil” as a category in politics,

mate indicates 2200 detainees within the United States, 800 at Guantánamo Bay, and 50,000 in Iraq and Afghanistan. *Law of War: Defining the Detainees*, L.A. TIMES, Nov. 21, 2004, at M2 (compiled by Michael Soller). After September 11, the Department of Justice detained hundreds of individuals, most of them Arab and Muslim men, for an average of eighty days each, both to pursue information and to incapacitate potential terrorists. See Tom Brune, *Nominee's Tactics Get a New Look: Now That Chertoff Has Been Picked To Head Homeland Security, Critics Seek New Scrutiny of Post-9-11 Detentions of Muslim, Arab Men*, NEWSDAY, Jan. 13, 2005, at A20, LEXIS, News Library, Newsdy File. On November 5, 2001, the Department of Justice reported without releasing names that it had detained 1182 individuals in connection with its September 11 investigation. Neil A. Lewis, *Judge Orders U.S. To Release Names of 9/11 Detainees*, N.Y. TIMES, Aug. 3, 2002, at A1. Most were ultimately released without charges; some remain detained on the ostensible basis of having violated U.S. immigration laws. See Brune, *supra*; Editorial, *In Jail by Choice: 9/11 Detainees Should Not Be Released*, S.D. UNION-TRIB., Sept. 15, 2003, at B6, LEXIS, News Library, Sdut File; Bob Sudyk, *Detained: Since 9-11, the Government Has Put Thousands of Immigrants Behind Bars, Where They Have Been Treated as if They Were Terrorists. But How Safe Do We Want To Be?*, HARTFORD COURANT, Jan. 4, 2004, at 5, LEXIS, News Library, Htcour File. Others have been deported. See Lyle Denniston, *US Detainees Take Case to UN Agency*, BOSTON GLOBE, Jan. 28, 2004, at A3. An internal Justice Department report in 2003 indicates failures by FBI agents to distinguish those detainees with connections to terrorism from those without any such connections. Tom Brune, *U.S. Faulted on Detainees: Internal Justice Report Finds Abuse, Some Held Too Long*, NEWSDAY, June 3, 2003, at A6, LEXIS, News Library, Newsdy File. One analyst attributes intelligence failures in part to the absence of federal agents familiar with the language and culture of the primarily immigrant detainees. See Juliette Kayyem, Editorial, *Changing the Color of Intelligence*, BOSTON GLOBE, Aug. 3, 2004, at A13.

³ James Risen, *35 Guantánamo Detainees Are Given to Pakistan*, N.Y. TIMES, Sept. 19, 2004, § 1, at 35. Guantánamo Bay is an anomalous zone, under the complete jurisdiction and control of the United States, yet arguably without the full constitutional protections available on U.S. territory. See Joseph Lelyveld, *“The Least Worst Place”: Life in Guantánamo*, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 100 (Richard C. Leone & Greg Anrig, Jr. eds., 2003); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1197-1201, 1228-33 (1996). In an arrangement dating to 1903, the United States leases the space from Cuba for the U.S. naval base. See *id.* at 1197. Today, according to an Australian journalist, “Guantanamo is a good place for a military prison because it is so difficult to reach. No unauthorised person can go into the base via Cuban territory and no unauthorised person can land directly on the base by sea or air.” Keith Suter, *How America Won Its Cuban Terror Prison*, DAILY TELEGRAPH (Sydney, Aus.), Dec. 7, 2004, at 47, LEXIS, News Library, Daitel File.

⁴ Neil A. Lewis, *Red Cross President Plans Visit to Washington on Question of Detainees' Treatment*, N.Y. TIMES, Dec. 1, 2004, at A27 (quoting a report of the International Committee of the Red Cross). Despite persistent military denials, internal FBI communications corroborate that cruel interrogation techniques have been used at Guantánamo Bay. See Carol Rosenberg, *Military Asserts Treatment at Guantanamo Is Humane*, BOSTON GLOBE, Dec. 25, 2004, at A13.

journalism, and academic study after September 11 has drawn religious rhetoric into once-secularized terrain. “Evil” comes to characterize the terrorist threat.⁵ The term casts those who respond to evil on the side of the right and the good.⁶ Unlike the public officials invoking evil after September 11,⁷ Ignatieff uses the moral category of “evil” to describe both the strategies of terrorists and the many steps that a democratic nation may pursue in response. In *The Lesser Evil*, he writes: “Using the word *evil* rather than the word *harm* is intended to highlight the elements of moral risk that a liberal theory of government believes are intrinsic to the maintenance of order in any society premised upon the dignity of individuals” (p. 18).

To maintain order while respecting the dignity of individuals — of all individuals — is to combine the calculus of utility and effectiveness with calculations of a different sort. For inevitably also at stake is our character as individuals and as a society. What kind of people are we and what kinds of values do we hold? What should we refuse to sacrifice even if survival is on the line? The acknowledgment that evil can describe not only terror, but also responses to it stands as one of the central contributions of Ignatieff’s book. Naming both the danger and the temptation “evil” also demonstrates that the author is an honest observer. For if evil is at work in the behavior of the terrorists, it is also at issue in the steps contemplated in response. Both can involve politically motivated violence.⁸ Both grow from fear and hatred. By engaging in either acts of terrorism or the war against it, individuals

⁵ See, e.g., Ron Rosenbaum, *Degrees of Evil: Some Thoughts on Hitler, bin Laden, and the Hierarchy of Wickedness*, ATLANTIC MONTHLY, Feb. 2002, at 63, 63–68 (comparing Hitler and bin Laden in light of the concept of evil). For an effort to trace semiotic shifts in the characterizations of “good” and “bad” after September 11, see Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 100–10 (2004).

⁶ Indeed, in his first public response to the September 11 attacks, President Bush spoke in terms of good and evil. See President George W. Bush, Statement by the President in His Address to the Nation (Sept. 11, 2001) (“Thousands of lives were suddenly ended by evil, despicable acts of terror. . . . America has stood down enemies before, and we will do so this time. None of us will ever forget this day. Yet, we go forward to defend freedom and all that is good and just in our world.”), <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>. For an especially passionate statement invoking notions of good and evil by a high government official whose wife was on the plane that crashed into the Pentagon, see Theodore B. Olson, Barbara K. Olson Memorial Lecture, in 6 TEX. REV. L. & POL. 1 (2001).

⁷ Such absolutist responses to terrorism have been characterized as constituting American “imperial zealotry.” See, e.g., Makau Mutua, *Terrorism and Human Rights: Power, Culture, and Subordination*, 8 BUFF. HUM. RTS. L. REV. 1, 8 (2002).

⁸ See Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227, 1235–36 (2002) (cautioning against “claiming that it is moral for us to kill, bomb, and maim, but not for Al Qaeda to do so”).

and groups become willing — and even eager — to sacrifice innocent people abroad and at home.⁹

Ignatieff acknowledges that violence, fear, and hatred plague anti-terrorism efforts by democratic societies. He does not paper over hard choices and true dilemmas. With a tragic sensibility honed through grappling with the history of violence and violent responses to violence, Ignatieff calls upon a practical wisdom that combines commitment to principle with an acknowledgment that the Constitution is not a suicide pact (p. 40).¹⁰ According to Ignatieff, neither principle nor necessity should trump. We may at times need “to take actions in defense of democracy [that] will stray from democracy’s own foundational commitments to dignity” (p. 8).¹¹ Ignatieff argues that we may need to depart — during rigorously time-limited emergencies (p. 51) — from some of our overarching legal and ethical commitments. We may at times need to pursue “a lesser evil” to fight a greater evil.¹²

As a result, to some readers, Ignatieff’s book seems to give the Bush Administration cover for the detention of Americans without trial, the imprisonment of non-Americans without charges or access to counsel, the surveillance of populations without particularized suspi-

⁹ Robert Jay Lifton goes further and argues that the September 11 attacks generated among many Americans a genuine fear that the government could manipulate in order to justify a policy of foreign control and domination, producing an amorphous, grandiose, and potentially limitless state of war. See ROBERT JAY LIFTON, *SUPERPOWER SYNDROME: AMERICA’S APOCALYPTIC CONFRONTATION WITH THE WORLD 9–11* (2003). Making the point more modestly, another commentator suggests that America risks responding to terror with terror. See Christopher L. Blakesley, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1046 (2003) (considering this risk and warning against potential U.S. responses that could be labeled “terroristic”). Quasi-religious ideas of expiation and revenge may also lead to sacrificing innocents. See *id.* at 1065–68.

¹⁰ Ignatieff quotes Justice Robert Jackson’s dissenting opinion in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). See also *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)). As Ignatieff notes (p. 32), President Abraham Lincoln, in justifying his invocation of military powers, articulated this principle in a message to Congress: “[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

¹¹ David Cole explores this issue from a distinctively civil libertarian perspective. See generally David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

¹² This idea, of course, supplies the name for the book (p. 8). Ignatieff makes related but distinct arguments for the use of lesser evils, including violence, by both constitutional democracies fighting terrorists and minority or disempowered groups with grievances against the state. Thus, for the political group pursuing violence,

[t]he evil does not consist in the resort to violence itself, since violence can be justified, as a last resort, in the face of oppression, occupation, or injustice. The evil consists in resorting to violence as a first resort, in order to make peaceful politics impossible, and, second, in targeting unarmed civilians and punishing them for their allegiance or their ethnicity. (p. 110)

cion, and the argument, unabashedly made by the United States government since September 11, that it is not bound by international, domestic, or military law.¹³ Because Ignatieff contemplates that sacrifice of individual dignity sometimes could be justified by pursuit of national security — and perhaps also because he supported the invasion of Iraq as a lesser evil¹⁴ — his book has drawn criticism as “an elegantly packaged manual of national self-justification.”¹⁵

Ignatieff’s analysis indeed would authorize — under special circumstances and with particularized justifications and administrative or judicial review — some departures from pre-existing norms restraining government action.¹⁶ But his analysis would also condemn vital aspects of the U.S. response to September 11.¹⁷ Ignatieff insists that no responses to terror should be undertaken without being justified, at the time or as soon as possible thereafter, to a reviewing decisionmaker and, as often as possible, to the people as a whole (pp. 11–12, 24). In struggling over the need to justify departures from legal

¹³ See, e.g., Ronald Steel, *Fight Fire with Fire*, N.Y. TIMES BOOK REV., July 25, 2004, at 13 (criticizing Ignatieff as providing a “legalistic” justification for counterterrorism measures). Among other claims, the Administration has asserted that the President’s “Commander-in-Chief power is at its height when the Nation itself comes under attack.” Reply Brief for the Petitioner, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027), available in 2004 WL 871163, at *13.

¹⁴ In an earlier book, Ignatieff defended what he called “Empire Lite” — a form of temporary imperialism that involves humanitarian intervention and nation-building. See MICHAEL IGNATIEFF, *EMPIRE LITE: NATION-BUILDING IN BOSNIA, KOSOVO, AND AFGHANISTAN* 122–27 (2003). Much of his argument attempted to rationalize not only the NATO intervention in Kosovo but also the Afghanistan and, at least implicitly, Iraq conflicts. Indeed, Ignatieff supported the invasion of Iraq. As he explained in an interview subsequent to the publication of the earlier book, he viewed the 2003 invasion as the lesser evil in the face of evidence of Saddam Hussein’s torture center and of his regime’s chemical attack on Halabja in 1988. *Tough Choices in War on Terror*, HERALD (Glasgow), Aug. 21, 2004, at 7, LEXIS, News Library, Gherald File. Still, “[e]ven as he insists upon his own good intentions with regard to Iraq, . . . Ignatieff is clearly uncomfortable with the widespread perception that he is an apologist for a badly-misconceived occupation orchestrated by a vociferously right-wing White House.” *Id.* Indeed, Ignatieff is not an apologist, but rather an original thinker attentive to power, security, and the dynamics of violence. He has written insightful books on cycles of revenge, see MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* (Noonday Press 1995), and on social needs and human rights, see MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* (1984). His vivid and eloquent biography of Isaiah Berlin locates the philosopher’s skeptical and humane liberalism in his responses to Russian tyranny, Jewish childhood, and British education. See MICHAEL IGNATIEFF, *ISAIAH BERLIN: A LIFE* (1998). Elaborating the themes in Berlin’s writings, Ignatieff sympathetically recreates the philosopher’s views while presenting an invigorating and human conception of Berlin’s commitments to liberty. Currently a professor at the John F. Kennedy School of Government at Harvard University, Ignatieff has steered its human rights program to unique and sustained engagement with questions of national security and the geopolitical instability exacerbated by failed states.

¹⁵ Steel, *supra* note 13.

¹⁶ See *infra* Part II, pp. 2151–56.

¹⁷ See *infra* Part I, pp. 2143–51 (applying Ignatieff’s analysis to features of the U.S. response to September 11).

and ethical principles as lesser evils, Ignatieff models sober agonizing as a guard against greater evil.

The central difficulty — for Ignatieff and for us all — is that “[e]vil is obvious only in retrospect.”¹⁸ Indeed, “[e]vil when we are in its power is not felt as evil but as a necessity, or even as a duty.”¹⁹ Even more difficult than determining what is a lesser and what is a greater evil is discerning how to proceed in the knowledge that the truth cannot be known. In fact, the truth will be distorted by felt necessity in the moment of perceived danger. The internment of Japanese residents of the United States and Japanese-American citizens, as Ignatieff recognizes (p. 75), should serve as a constant reminder of such distortions produced by the sense of necessity.²⁰ During World War II, in the grip of a felt emergency, and with general acclaim from a majority of the American population, officials forcibly evacuated and incarcerated 120,000 lawful residents and actual U.S. citizens simply because they were of Japanese ancestry.²¹ The government confiscated their businesses and homes and forced sales for a pittance on the basis of no particular evidence.²² Deferring to military and executive judgment, the Supreme Court upheld the convictions in the name of necessity.²³ Propelled by a sense of necessity, and seeking deference from the courts, the officials misrepresented the state of the evidence. It was for that wrongdoing that forty years later a district court vacated the convictions.²⁴

¹⁸ GLORIA STEINEM, *If Hitler Were Alive, Whose Side Would He Be On?*, in *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 332, 346 (2d ed. 1995). This may be an overstatement; some evil may be obvious at the first moment it rears its head. Nonetheless, there is an important insight here: while caught in the grip of felt necessity, people often commit acts that appear to others — and even later to themselves — as truly evil. At the moment of action, few evildoers think of themselves as such. Instead, they usually have a surfeit of justification and some confidence in their own judgment. Trusting the judgment of those acting in the moment, thus, simply cannot prevent evil.

¹⁹ SIMONE WEIL, *GRAVITY AND GRACE* 121 (1952).

²⁰ Rather than emphasizing the distortions induced by a sense of necessity and panic, Ignatieff turns to the Japanese-American evacuation and internment to illustrate that his lesser-evil approach would “put far more emphasis than a pragmatic one on the loss entailed in the abridgment of the rights of the Japanese” (p. 35). Someone using the lesser-evil approach would consider claims that the internment would shorten the war, but would assess the uncertainty of those claims and therefore find curtailment of civil liberties unjustifiable, especially given a prior commitment to the view that abridging civil liberties is an evil (p. 36). For a searing narrative about how natural the internment of Japanese Americans seemed to whites, see ELLA LEFLAND, *RUMORS OF PEACE* (1979).

²¹ PETER IRONS, *JUSTICE AT WAR* vii (1983).

²² See YASUKO I. TAKEZAWA, *BREAKING THE SILENCE: REDRESS AND JAPANESE AMERICAN ETHNICITY* 30–31 (1995).

²³ See *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

²⁴ *Korematsu v. United States*, 584 F. Supp. 1406, 1416–19 (N.D. Cal. 1984). For the arguments pressed in favor of vacating the convictions, see *Petition for Writ of Error Coram Nobis, Korematsu*, 584 F. Supp. 1406 (No. CR-27635 W), *reprinted in* *JUSTICE DELAYED: THE*

If this dark episode teaches us anything, it is that we should be skeptical about claims of necessity in wartime. Our skepticism should prompt us to review policies adopted in the wake of a felt emergency and cast out those enacted in error. Courts, legislatures, media, and citizens must undertake independent scrutiny of restrictions on civil liberties adopted during times of national crisis.²⁵ Even if official review is initially withheld from the public — or occurs in public view years after the events — knowledge that judicial, legislative, and journalistic review will occur may serve to deter misconduct. It also affords the occasion for public learning about misconduct. Learning after the fact of impropriety may lead to decisions to punish the wrongdoing or to take steps to prevent its recurrence. The commitment to maintaining review reflects and, in turn, keeps alive skepticism about assertions by officials that they need power and need not justify its exercise. But it is skepticism, not disbelief, that must be cultivated. The goal is to proceed with skepticism and restraint when we know for certain that we do not know enough and that our judgment is skewed by fear. The challenge, then, is to devise reliable rules and institutions — and to cultivate the character of both leaders and the people whom they serve.

At its best, Ignatieff's book faces this challenge squarely. Ignatieff articulates specific questions and methods that a constitutional democracy should use to assess and reassess exigent measures that violate individual dignity. He calls for precommitment strategies to respect the rights of individuals because even democratic states are "sorely tempted to abridge them in times of danger" (p. 31).²⁶ He deems blan-

RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 125–88 (Peter Irons ed., 1989). For a description of the *Korematsu* incident more generally, see JACOBUS TENBROEK ET AL., *PREJUDICE, WAR AND THE CONSTITUTION* (1954). The Court did not wait forty years to reach the conclusion that the government lacked the authority to detain an individual already cleared of any suspicion of disloyalty. See *Ex Parte Endo*, 323 U.S. 283, 302–04 (1944). For a thoughtful argument that this decision — resting ostensibly on a construction of the governing regulations and statute — should be remembered as much as *Korematsu*, see Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003).

²⁵ See Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 ASIAN L.J. 37, 49–50 (2003) (treating *Korematsu* as a lesson about "[t]he need for continuing political activism and constant vigilance to protect our civil rights").

²⁶ The courts have long treated the Bill of Rights as a precommitment mechanism. See, e.g., *Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil — a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."). Ignatieff's arguments reinforce the importance of articulating in moments of perceived emergency precommitments to procedures and structures to monitor decisions and promote democratic accountability, as well as precommitments to individual rights. For additional work on this terrain, see Bruce Ackerman,

ket detentions and broad roundups of suspects always mistaken because they violate individual rights and depend on the erroneous view of guilt by association (p. 10). He insists on administrative, legislative, or judicial review, in camera if necessary to enable effective intelligence gathering, but review nonetheless (pp. 24, 134).²⁷ And he calls for vigorous reconsideration of extreme governmental power authorized during emergencies (pp. 39–40). Otherwise, a strategy of “better safe than sorry” will drive responses to all threats and will risk leaving statutory authorization for extraordinary governmental powers on the books long after those threats have passed (p. 80).

For Ignatieff, potential abuses can best be deterred, and the faith of citizens best earned and renewed, by adversarial justification before formal institutions and the public (pp. 50, 168–70). Mindful that a ruthless government can shape perceptions and manufacture consent, Ignatieff rests his hope particularly on “the intransigent courage of the few” who would defend rights threatened in an emergency (pp. 52–53). Perhaps too optimistically, he expresses faith that agents of a liberal democratic state can “hold the line that . . . separates targeted assassination of enemy combatants from assassinations that entail the death of innocent civilians” (p. 118).²⁸ To his credit, Ignatieff continually emphasizes the morally problematic nature of any sacrifice of individual liberty in the name of enhanced security, and this attention is the primary contribution of *The Lesser Evil*. Ignatieff reminds us that such a sacrifice, even when justifiable, produces a moral remainder, taxing the character of society and demanding amends (p. 18). These issues must come into sharp focus now, as some provisions of the 2001 USA PATRIOT Act²⁹ (the Patriot Act) reach sunset — and opportunity for renewal — this year.³⁰

The Emergency Constitution, 113 YALE L.J. 1029 (2004); and Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004).

²⁷ Ignatieff may have too hopeful a view about the independent check judicial review provides. Like the *Korematsu* Court, courts today easily defer to government claims of necessity in the war on terror. For example, a federal court of appeals concluded that the Bush Administration could conceal the identities of the hundreds of people it detained after September 11. *See* *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003). Another federal court, however, rejected the government's blanket closure of deportation hearings after September 11. *See* *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710–11 (6th Cir. 2002).

²⁸ The book also explores the dynamics of terrorism, especially given the legitimacy of some motivating grievances (p. 86) and the psychology of terror and nihilism (pp. 121–32), including the cult of sacrifice that interferes with people's capacities to question or respond rationally to counterterrorism measures (pp. 150–51).

²⁹ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

³⁰ *See id.* § 224(a) (codified at 18 U.S.C.A. § 2510 note (West 2000 & Supp. 2004)). Although the statute exempts many of its features from this sunset provision, *see id.* § 224, nothing would prevent Congress from reconsidering any and all portions of the Patriot Act if it considers renew-

Reviewing historical examples, Ignatieff's book nonetheless is primarily a general work of ethical reflection. It leaves to others the tasks of applying its advice to our current situation and of testing that advice. I take these up as my tasks here in hopes of spurring more concrete discussion in the exact spirit that Ignatieff enacts: sober, realistic, and mindful of tragic choices. It is striking, if easy, to see how much of the Bush Administration's response to September 11 fails even in this context.³¹ The defects of U.S. practices after September 11 are exposed by Ignatieff's tests for justifiable lesser evils and are the focus of the first Part of this Review, which should put to rest the incorrect perception that Ignatieff's book offers an intellectual apology for the practices of the Bush Administration. I then look at those departures from traditional protections of individual rights that, even in light of their jeopardy to national morality, Ignatieff believes would satisfy the precommitments he articulates. Here, I raise some questions about whether Ignatieff properly applies his own criteria and about whether the criteria require more specificity if they are to fulfill their purposes. What remains after this analysis are substantial areas where we cannot tell what precisely is prohibited by Ignatieff's guides — which unfortunately means we cannot tell in crucial moments what we should do. Thus, the final Part of the Review turns to specific steps to combat terrorism that could be pursued both to test the guides offered in *The Lesser Evil* and to consider what roles law, democracy, and our own individual choices should play if ethical imperatives are to receive their due.

Like Ignatieff, I take the traditional due process our constitutional democracy affords its domestic citizens as the baseline for assessing the steps proposed to fight terrorism. Some resist this assumption and posit that September 11 put the country on a new course. Thus, some scholars push for new constitutional practices designed for an emergency;³² others argue specifically for deference to the executive branch

ing those provisions that do face expiration at the end of 2005. The opportunity to review critically the existing antiterrorist measures is especially vital given that terrorism will probably persist longer than “we can safely suspend democratic freedoms or our traditional separation of powers.” PHILIP B. HEYMANN, *TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR* 179 (2003).

³¹ Essentially, the current Administration's response to terrorism largely fails Ignatieff's prudential tests of necessity, effectiveness, and last resort. See *infra* Part I, pp. 2143–51. It potentially complies with his demand for open and adversarial review — if the availability of Supreme Court consideration of administrative refusals of process and disclosure counts. See *infra* Part II, pp. 2151–56. But it substantially breaches respect for human dignity, the value that requires even greater vigilance than Ignatieff suggests. See *infra* Part III, pp. 2156–65.

³² See Ackerman, *supra* note 26. For engaged debate, see David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 *YALE L.J.* 1753 (2004); and Tribe & Gudridge, *supra* note 26. For a response to the debate he launched, see Bruce Ackerman, *This Is Not War*, 113 *YALE L.J.* 1871 (2004). Kathleen Sullivan advanced an earlier defense of the resources within

due to the congressional authorization of force.³³ If only to be completely frank about precisely what sacrifices of liberty and democracy are at stake, I use Americans' longstanding rights and freedoms as the baseline for all who are subject to our nation's antiterrorism measures, for these rights and freedoms are what we jeopardize when we consider which lesser evils are justifiable.³⁴

I. WHAT FAILS THE PRECOMMITMENTS?

Ignatieff proposes six tests for policymakers considering coercive measures to fight terrorists (pp. 23–24):³⁵

(1) Do the measures sufficiently respect human dignity so as to avoid cruel and unusual punishment, torture, penal servitude, extrajudicial execution, or rendition of suspects to rights-abusing countries — each of which is flatly unacceptable?;

(2) Are departures from prevailing due process standards “really necessary” and are they contained so that they are the least restrictive necessary? (p. 24);

(3) Are the measures truly going to be effective — with effectiveness defined to encompass both short- and long-term effects, including political consequences?;

(4) Are the measures truly the last resort? “[H]ave less coercive measures been tried and failed?” (p. 24);

(5) Will open and adversarial legislative and judicial review follow the action immediately or soon thereafter?; and

(6) Does the nation attend to its international obligations and to the opinions of allies?

the U.S. Constitution for addressing the emergency posed by terrorism in War, Peace, and Civil Liberties, Tanner Lectures at Harvard University (Nov. 8–9, 2001). For further recent consideration of how the law should work when faced with an emergency like the threat of terrorism, see ERIC A. POSNER & ADRIAN VERMEULE, *ACCOMMODATING EMERGENCIES* (Chi. Pub. L. & Legal Theory, Working Paper No. 48, 2003), at http://ssrn.com/abstract_id=441343; Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011 (2003); Geoffrey R. Stone, *War Fever*, 69 *MO. L. REV.* 1131 (2004); and Laurence H. Tribe, *Supreme Constraint*, *WALL ST. J.*, July 1, 2004, at A14.

³³ See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2047, 2054, 2056, 2078 (2005).

³⁴ For a remarkably direct and insightful analysis by a sitting judge of struggles over what rights to sacrifice and what rights to save in a democracy that is neither at war nor not at war, see Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 16 (2002).

³⁵ The tests bear an intriguing resemblance to — and yet are not reducible to — U.S. constitutional law, especially in their implicit commitment to restraining state action according to due process, compelling state interests, and least restrictive means. Yet Ignatieff's tests also include practical attention to short- and long-term effectiveness, in terms of both security and political effects, and respect for both existing international legal obligations and the opinions of allies.

Ignatieff's proposals, judicious and sober as they are, require greater concreteness both to assess where they bite and to press them into actual service. For example, Ignatieff asserts that incursions on individual rights always need democratic processes — including prompt public justification (p. 10) — but does not specify when or where. Yet precisely such details would reveal the feasibility and effectiveness of the demand for full and public justification; these features are essential both to evaluating and to implementing the idea.

One obvious context for the tests of *The Lesser Evil* is the current U.S. response to terrorism. It is not difficult to see how Ignatieff's tests condemn its general tenor. A probing review by long-time legal journalist Anthony Lewis juxtaposes arguments from *The Lesser Evil* with the general approach taken by the Bush Administration and exposes how sharply the Administration's acts diverge from Ignatieff's view.³⁶ While Ignatieff insists upon acknowledging and questioning the incursions on rights posed by security measures, the Bush Administration treats questions about its policies as unpatriotic support for the terrorists. While Ignatieff elevates judicial review and counsel for detainees to the status of indispensability, the Bush Administration tries to prevent access to counsel and to courts for those accused who have connections to al Qaeda. And while Ignatieff presses for as much transparency as possible, the current government operates with secrecy about the identities and numbers of detainees. Ignatieff's tests would condemn the government's secrecy, its confident obliviousness to the moral consequences of its acts, and its treatment of our liberties as weaknesses to be cast off rather than commitments to be cherished.³⁷

Many specific features of the current U.S. response to September 11 — including broader government access to information, detention of immigrants, and resort to military commissions — fail Ignatieff's tests. I will consider three in turn.

A. *Production of Business Records*

Section 215 of the Patriot Act broadens the scope of court orders for the production of business records under the Foreign Intelligence Surveillance Act³⁸ (FISA). The business records provision was previously limited to “a common carrier, public accommodation facility, physical storage facility or vehicle facility,”³⁹ but now reaches any entity requiring access to “any tangible things” — defined as “books, records, papers, documents, and other items” — so long as the materials

³⁶ Anthony Lewis, *Bush and the Lesser Evil*, N.Y. REV. BOOKS, May 27, 2004, at 9, 9–10.

³⁷ See *id.*

³⁸ 50 U.S.C.A. § 1861 (West Supp. 2004).

³⁹ 50 U.S.C. § 1862(a) (2000).

are part of a duly authorized investigation to obtain foreign intelligence information.⁴⁰ The prior version of the statute was limited only to “records” and required a showing that the information was connected to a foreign power or one of its agents.⁴¹ Under the Patriot Act, however, court orders can be used, for example, to give the government access to library and bookseller records — apparently to track what sources particular patrons use — without any prior allegation by the government of specific facts justifying the order, so long as the investigation is said to protect against international terrorism or to aid clandestine intelligence activities.⁴² Although FISA may not be used to investigate a U.S. person if the investigation is conducted solely on activities protected by the First Amendment,⁴³ libraries can be compelled to turn over material following sealed proceedings before a secret court that issues orders that do not state their purpose.⁴⁴ The librarians are required to keep such requests secret. The potential chilling effect of such government power on the pursuit of information by library patrons, in addition to the invasions of privacy and denials of due process represented by these procedures, has generated objec-

⁴⁰ See 50 U.S.C.A. § 1861(a)(1) (emphasis added); see also Kathryn Martin, Note, *The USA Patriot Act's Application to Library Patron Records*, 29 J. LEGIS. 283, 287 (2003) (discussing section 215 of the Patriot Act).

⁴¹ See 50 U.S.C. § 1862.

⁴² The Patriot Act authorizes the Federal Bureau of Investigation to use a less-than-probable-cause standard for investigations in which “a significant purpose” is foreign intelligence gathering or investigating terrorism. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (internal quotation marks omitted) (amending 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (2000)). Professor Kim Lane Scheppele thinks that none of the provisions of the Patriot Act poses as great a threat to civil liberties as the recently announced Attorney General Guidelines governing foreign intelligence searches, which allow searches under a very low standard of evidence when foreign intelligence collection is merely a significant purpose of the investigation, even though such searches can also sweep in information about citizens. See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1041-44 (2004). The Attorney General Guidelines obviously work in tandem with the Patriot Act and FISA to enlarge federal investigatory powers. Scheppele also argues more generally that contrary to a sensible response to a crisis, the Bush Administration has continued to expand powers as time passes rather than to contract them after an initial set of emergency responses. *Id.* at 1039.

The Patriot Act's authorization of “sneak-and-peek” warrants — allowing for delayed notification to the subject — also seems to violate the Fourth Amendment and the Federal Rules of Criminal Procedure absent a strong demonstration of need, at least for the broad scope permitted. See USA PATRIOT Act of 2001 § 213 (amending 18 U.S.C. § 3103a (2000)) (authorizing delayed notification to a person subject to an electronic communications search if the government can show that giving immediate notice would (1) endanger an individual's physical safety; (2) cause someone to flee prosecution; (3) cause evidence to be tampered with; (4) create potential for witness intimidation; or (5) jeopardize the investigation or unduly delay trial). A federal district court found that national security letters used by the FBI as a secret administrative subpoena violated the Fourth Amendment. See *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 526 (S.D.N.Y. 2004).

⁴³ 50 U.S.C.A. § 1861(a)(1).

⁴⁴ See MARY MINOW, LIBRARY RECORDS POST-PATRIOT ACT (FEDERAL LAW) (Sept. 16, 2002), at <http://www.llrx.com/features/libraryrecords.htm>.

tions by librarians and civil libertarians.⁴⁵ Under pressure from librarians, Attorney General John Ashcroft declassified secret information about the use of section 215 and disclosed that as of September 2003, it had not been used at all.⁴⁶ Even still, the Bush Administration halted a bipartisan effort in the House of Representatives to exempt libraries from this provision.⁴⁷

Assuming that Ashcroft truthfully reported that the provision has not been used, both its adoption and retention fail Ignatieff's requirement that departures from due process be "really necessary" and be contained to the least restrictive necessary (p. 24). Nor is section 215 "truly the last resort" (p. 24) vis-à-vis less coercive measures already tried without success. Unlike the Patriot Act, Britain's Anti-Terrorism Act exempts library records from the business records that can be searched with relative ease. Under British law, the government must convince a judge that the information pursued by a search "adds substantial value to the investigation of a serious offense, that other methods of obtaining access to the material would clearly not succeed, and that the search is in the public interest and outweighs any harm to confidential relationships."⁴⁸ The United States should learn from Britain's rule favoring individualized scrutiny that the government should adopt a more deferential rule only as a last resort. The contrast between the U.S. rule and the British practice indicates that a less restrictive measure could be quite adequate. This conclusion is made all the more poignant by the fact that the Bush Administration stands by this provision despite claiming that it has never been invoked.

B. Detention of Immigrants

The Patriot Act allows the government to detain an immigrant suspected of terrorist activities for up to seven days and additional renewable six-month periods if the alien's release would "threaten the national security of the United States or the safety of the community

⁴⁵ The Campaign for Reader Privacy collected and delivered to Congress over 200,000 signatures from libraries, booksellers, publishers, and writers on a petition to amend section 215 of the Patriot Act. See <http://www.readerprivacy.com> (last visited Apr. 10, 2005). Then-Attorney General John Ashcroft, "departing from his usual remarks," "mocked and condemned the American Library Association and other Justice Department critics for believing that the F.B.I. wants to know 'how far you have gotten on the latest Tom Clancy novel.'" Eric Lichtblau, *Ashcroft Mocks Librarians and Others Who Oppose Parts of Counterterrorism Law*, N.Y. TIMES, Sept. 16, 2003, at A23; see also Shannon McCaffrey, *Ashcroft Castigates Judges on War Powers*, PITTSBURGH POST-GAZETTE, Nov. 13, 2004, at A6.

⁴⁶ Dan Eggen, *Ashcroft: Patriot Act Provision Unused*, WASH. POST, Sept. 18, 2003, at A13.

⁴⁷ See Bob Hoover, *Chalk Up One Victory for Freedom To Publish*, PITTSBURGH POST-GAZETTE, Dec. 26, 2004, at J4.

⁴⁸ Martin, *supra* note 40, at 304.

or any person."⁴⁹ This provision amounts to the power of indefinite detention.⁵⁰ It departs from the Supreme Court's articulation of due process requirements for the treatment of immigrants in its failure to specify the burden of proof, its extreme grant of executive authority, and its effect of permitting indefinite detentions.⁵¹ Hundreds of immigrants detained after September 11 spent an average of eighty days in detention.⁵² Detained at undisclosed locations for undisclosed reasons, the immigrants faced either secret hearings or no hearings at all until a federal judge stepped in.⁵³ In addition, the Department of Justice Inspector General documented patterns of physical and verbal abuse of detained immigrants by federal guards, as well as the failure to distinguish those presenting terrorist threats from others.⁵⁴

Although the government has backpedaled from these initial practices, much remains in place that fails Ignatieff's tests. The Department of Homeland Security, newly in charge of immigration, has pledged to clarify what counts as an emergency, set up periodic review to ensure greater protections, and restrict the use of detention while pursuing security.⁵⁵ Judicial and administrative reviews have reined in the practices and demonstrated that the prior broad measures are not now warranted.⁵⁶ But the statutory authority for broad and secret de-

⁴⁹ See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350, 351-52 (codified at 8 U.S.C.A. § 1226a(a)(6) (West Supp. 2004)).

⁵⁰ See Christopher E. Smith, *The Bill of Rights after September 11th: Principles or Pragmatism?*, 42 DUQ. L. REV. 259, 273-79 (2004); Jonathan Grebinar, Comment, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 FORDHAM URB. L.J. 261, 279 (2003). Indefinite detention of an immigrant is especially excessive when the government has the authority and ability to deport the individual.

⁵¹ See *Zadvydas v. Davis*, 533 U.S. 678, 690-701 (2001) (finding indefinite detentions of immigrants to be constitutionally problematic, especially when the immigrants have not yet entered the country and when it is not clear that Congress intended to authorize indefinite detentions).

⁵² See Ricardo Alonso-Zaldívar, *U.S. Restricts Indefinite Detention of Immigrants*, CHI. TRIB., Apr. 14, 2004, § 1, at 1.

⁵³ See Christopher Edley, Jr., Editorial, *A U.S. Watchdog for Civil Liberties*, WASH. POST, July 14, 2002, at B7; David Sarasohn, *Justice Dept. Ideas Thrown Out of Court*, OREGONIAN (Portland), June 5, 2002, at B11, LEXIS, News Library, Oregon File.

⁵⁴ Paul von Zielbauer, *Detainees' Abuse Is Detailed*, N.Y. TIMES, Dec. 19, 2003, at A32; see also Bob Herbert, *Ashcroft's Quiet Prisoner*, N.Y. TIMES, Aug. 13, 2004, at A21.

⁵⁵ See Eric Lipton, *Homeland Security Chief To Shift from "Sky is Falling" Approach*, N.Y. TIMES, Mar. 17, 2005, at A21. When Judge Michael Chertoff replaced Tom Ridge as head of the Department of Homeland Security, he indicated a commitment to respect civil liberties as well as national security. *Washington in Brief: Senate Confirms Chertoff as Homeland Security Chief*, WASH. POST, Feb. 16, 2005, at A5. Yet critics note that Chertoff previously authorized the roundup of immigrants after September 11 and was involved in the legal consideration of coercive interrogation techniques. See, e.g., Helen Thomas, Editorial, *Good Reason To Fret About Gonzales, Chertoff, Others*, HOUSTON CHRON., Feb. 6, 2005, at 3, LEXIS, News Library, Hchrn File.

⁵⁶ In a related context, the Supreme Court required stiffer procedural protections for immigrants detained by the Department of Homeland Security than those that the government proposed. See *Clark v. Martinez*, 125 S. Ct. 716, 727 (2005). Great Britain's House of Lords ruled that indefinite detention of foreigners suspected of, but not yet charged with, terrorism is unjusti-

tention remains on the books, in clear violation of Ignatieff's "really necessary" and "least restrictive possible" requirements.⁵⁷ More specifically, the government cannot satisfy the demand of using the least restrictive means necessary simply by announcing that it needs the power to detain indefinitely anyone it secretly deems, without adversarial process or review, a danger.

C. Use of Military Commissions

The Bush Administration has indefinitely detained suspected terrorists and has further argued that the federal courts should abstain from hearing cases brought on behalf of detainees at Guantánamo Bay. Instead, the government planned to use newly created military commissions, which comply neither with the Geneva Conventions⁵⁸ nor the Uniform Code of Military Justice,⁵⁹ to try detainees or adjudicate their claims.⁶⁰ Rebuffed in June 2004 in the case of *Hamdi v. Rums-*

fiable. See Lizette Alvarez, *British Court Says Detentions Violate Rights*, N.Y. TIMES, Dec. 17, 2004, at A1. For a comparison of British and U.S. detention policies after September 11, see Alexandra Chirinos, *Finding the Balance Between Liberty and Security: Legal Issues Surrounding the Detention of Terrorist Subjects* (2004) (unpublished LL.M. thesis, Queen's University of Belfast) (on file with the Harvard Law School Library) (editorial version forthcoming 18 HARV. HUM. RTS. J. (Apr. 2005)). The seeming legitimacy of the detentions may stem in part from efforts to distinguish "good" and "bad" Muslims. See Engle, *supra* note 5.

⁵⁷ Ignatieff specifically calls for judicial review of all detentions (p. 29).

⁵⁸ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

⁵⁹ 10 U.S.C.A. §§ 801–946 (West 1998 & Supp. 2004).

⁶⁰ Citing his authority as President and as Commander-in-Chief of the Armed Forces of the United States under the Constitution, and citing the laws of the United States of America, including the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C.A. § 1541 note (West Supp. 2004)), and sections 821 and 836 of 10 U.S.C., President Bush issued a military order establishing military commissions that have exclusive jurisdiction over noncitizens suspected of being or harboring al Qaeda members or of engaging, assisting, or conspiring in "acts of international terrorism . . . or acts . . . that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States [or] its citizens, national security, foreign policy, or economy." Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, 919 (2001), *reprinted in* 10 U.S.C.A. § 801. The military commissions may convict and sentence by super-majority, rather than unanimous, vote of judges appointed by the Secretary of Defense. See *id.* at § 4(c)(6)–(7).

Confusion and delays surrounding the military commissions apparently produced disputes within the Bush Administration. See Tim Golden, *Administration Officials Split over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1. Between 2002 and mid-2004, most of the detainees not charged with war crimes received no information about the grounds for their detention, lacked access to counsel or anyone outside Guantánamo, and had no chance to challenge their status as "enemy combatants," a category created by the Administration to identify and detain potential targets for war crimes prosecutions. See *In re Guantánamo Detainee Cases*, Nos. 02-CV-0299 et al., 2005 U.S. Dist. LEXIS 1236, at *9–10 (D.D.C. Jan. 31, 2005). According to officers at Guantánamo Bay, few of the detainees captured in Afghanistan are able to provide

valuable intelligence. Golden, *supra*. Nonetheless, hundreds remained detained without being charged.

After the Supreme Court ruled in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), that detainees have a right to review of their status, the Pentagon established Combatant Status Review Tribunals to assess whether an individual is a member or supporter of a terrorist organization. See Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; see also Carol D. Leonnig & Julie Tate, *Detainee Hearings Bring New Details, Disputes*, WASH. POST, Dec. 11, 2004, at A1. According to a recent report, these tribunals have rejected 387 of the 393 pleas they have heard. Jane Mayer, *Annals of Justice: Outsourcing Torture*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 123. In a large majority of the fifty cases reviewed by the *Washington Post*, panels of three military officers for each case relied on classified evidence withheld from the detainee or on confessions that may have been obtained under duress. Leonnig & Tate, *supra*. The Pentagon granted no access to civilian lawyers. Josh White, *U.S. To Tell Detainees of Rights*, WASH. POST, July 10, 2004, at A7. The government also objected to habeas corpus jurisdiction in the federal courts, but lost that argument when the Supreme Court ruled in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), that detainees held at Guantánamo Bay are entitled to invoke the federal courts' authority under federal statutory habeas jurisdiction. *Id.* at 2699.

Numerous court challenges to the ongoing detention at Guantánamo Bay have found their way to the federal courts. An executive resolution by the federal district court for the District of Columbia invited the judges whose dockets held such cases to transfer particular common issues and motions to Judge Joyce Green. Judge Richard Leon did not transfer the motions to dismiss in two cases assigned to him, however, and on January 19, 2005, he issued an opinion rejecting habeas challenges brought by seven foreign nationals to the President's authority to detain them without process. See *Khalid v. Bush*, No. 1:04-1142, 2005 U.S. Dist. LEXIS 749, at *1-2 (D.D.C. Jan. 19, 2005). The opinion reasoned that the claimants had failed to offer any grounds for challenging the authority of the President to detain foreign nationals and had failed to establish a right to federal judicial relief rather than military review process. *Id.* at *50.

On January 31, 2005, Judge Green issued an opinion, which was made available in full to counsel but only in part to the public due to redactions of classified material, on the other eleven Guantánamo detention cases. See *Detainee Cases*, 2005 U.S. Dist. LEXIS 1236. Judge Green ruled that, because they are held in the exclusive jurisdiction and control of the United States, the detainees are entitled to due process under the Fifth Amendment. *Id.* at *63. She explained:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Id. at *62-63. Given the length of incarceration already experienced by the claimants, and the government's inability to articulate when or how it would determine that the war on terrorism has ended, the court balanced the prospect of life imprisonment against the government's obligation to protect the country from terrorist attacks and concluded that more rigorous procedures must be used to help ensure that innocent people are not held indefinitely. See *id.* at *103-04. The court relied on a prior protective order balancing the detainees' interests against the government's security concerns and making classified information available to counsel who have appropriate security clearances to compensate for the detainees' lack of access to classified information, *id.* at *84-88; refused to dismiss specific claims that information used by the tribunals was allegedly acquired by torture or coercion, *id.* at *94; reserved for separate hearing whether the definition of "enemy combatant" satisfies both the Congressional Authorization for Use of Military Force and constitutional due process, *id.* at *98; and preserved, despite the government's motion to dismiss, allegations that the detention of some of

feld,⁶¹ the government nonetheless reasserted these arguments in response to the habeas petition of Salim Ahmed Hamdan, a thirty-five-year-old Yemeni who served as a chauffeur for Osama bin Laden in Afghanistan. The government's unrepentant commitment to its position is manifest in its appellate challenge to the district court's ruling that (1) it had jurisdiction to consider Hamdan's claims; (2) the Geneva Conventions apply to him, at least in determining whether he qualifies for prisoner-of-war status; and (3) such an assessment must be made by a competent tribunal, as which the President does not count.⁶²

Once again, use of unique and contested military commissions fails Ignatieff's requirement that "departures from [existing] due process standards" be "really necessary" and contained to the least restrictive possible and truly "the last resort" (pp. 23–24).⁶³ Moreover, the government's refusal to comport with the Geneva Conventions could fail Ignatieff's requirement that lesser-evil strategies be effective over the longer term. One would think that this test could not be met by a strategy — like indefinite detention without process — that undermines the government's moral legitimacy at home and abroad. Indeed, the reviewing district court judge in Hamdan's case concluded:

The government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. . . . [O]ther governments have already begun to cite the United States' Guantanamo policy to justify their own repressive policies⁶⁴

the petitioners violated the Third Geneva Convention, *id.* at *111–12. The decision left further proceedings to the judges to whom the cases were originally submitted. *See id.* at *115.

Proposed changes circulating within the Pentagon would bring the tribunals more in line with the procedures used in traditional courts-martial. Tim Golden, *U.S. Is Examining Plan To Bolster Detainee Rights*, N.Y. TIMES, Mar. 27, 2005, at A1. The Administration may be waiting for the results of challenges or may remain resistant to according detainees the rights granted to other defendants in U.S. courts. *Id.*

⁶¹ 124 S. Ct. 2633; *see also supra* note 1 (summarizing the *Hamdi* decision).

⁶² *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 157–58, 160, 162 (D.D.C. 2004). The government failed in its effort to secure expedited review before the Supreme Court. *See Hamdan v. Rumsfeld*, 125 S. Ct. 680 (2004) (mem.) (denying motion for expedited consideration of the petition for writ of certiorari). Its appeal is pending. *See* Andrew Zajac, *Trial of bin Laden Driver May Affect Hussein Case*, CHI. TRIB., Dec. 30, 2004, § 1, at 8.

⁶³ Similar analysis would extend to the structure and provisions of the military commissions established by the Administration, for they afford no protection against forced confessions and no guarantee of access to counsel. *See* Human Rights Watch, Press Release, U.S.: New Military Commissions Threaten Rights, Credibility (Nov. 15, 2001), at <http://www.hrw.org/press/2001/11/miltribs1115.htm>.

⁶⁴ *Hamdan*, 344 F. Supp. 2d at 163 (citing LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES, at 77–80 (2003)).

Detentions without process do not solve the problem of domestic terrorist threats, to say nothing of danger from abroad. Assessments of the use of internment in Northern Ireland indicate that it did “not provide lasting solutions” to terrorism there; instead, the reimposition of internment triggered a spike in violence and “damage[d] the fabric of the community.”⁶⁵

Ignatieff warns that, viewed in retrospect, none of the historical sacrifices of liberty made in the name of security hold up (p. 55).⁶⁶ He implicitly warns that current policies may suffer the same fate. Major elements of the United States’s response to September 11 fail Ignatieff’s tests — even though he argues for pursuing other measures that also depart from our constitutional and ethical traditions.

II. WHAT SATISFIES THE PRECOMMITMENTS?

Based strictly upon his criteria for legitimacy, Ignatieff’s analysis seems to track the usual liberal critiques of antiterrorist policies in the United States. Yet unlike traditional liberal critics, Ignatieff would approve secret judicial review of wiretap and other surveillance applications (p. 134); intelligence gathering through deception, entrapment, and payment, all under cover of official denials (p. 134); targeted assassinations of bona fide terrorists actively engaged in “planning imminent attacks that cannot be stopped in any other way” (p. 133);⁶⁷ and preemptive military action against states harboring terrorists and against individuals or training camps preparing imminent attacks (pp. 162–67).

Despite objections by civil liberties advocates, Ignatieff explicitly condones use of a mandatory national identity card as a lesser evil, although he calls for legislation restricting both the kind of data that can be retrieved through it and access to that data (pp. 78–79). Ignatieff is

⁶⁵ Michael P. O’Connor & Celia M. Rumann, *Into the Fire: How To Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1701 (2003) (alteration in original) (quoting HOUSE OF COMMONS COMM. ON MEASURES TO DEAL WITH TERRORISM IN N. IRELAND, CMND. 5847, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND 7–8 (1975)) (internal quotation marks omitted).

⁶⁶ The Red Scare of 1919, in Ignatieff’s view, offers a more analogous historical example for the nation after September 11 than the assault on Pearl Harbor (p. 55). History, Ignatieff argues, shows that democracies harm themselves by misjudging the nature of external threats. Reviewing responses to terrorism by Czarist Russia; Weimar Germany; Algeria and France in the 1950s; Northern Ireland and Great Britain from the 1960s to the present; Argentina, Peru, and Columbia in the 1970s; and Israel in the past decade (pp. 63–78), he concludes that “the historical record shows that while no democracy has ever been brought down by terror, all democracies have been damaged by it, chiefly by their own overreactions” (p. 80).

⁶⁷ Ignatieff argues that targeted assassinations are a legitimate lesser evil when less violent alternatives endanger U.S. personnel, when the targets are planning imminent attacks that cannot be prevented by alternative means, and when “all reasonable precautions are taken to minimize collateral damage and civilian harms” (p. 133).

far more sanguine about the risks of such policies than others, who have documented abuses in historical uses of such national identity cards.⁶⁸ He misses, though, perhaps the best argument for his position: in effect, this nation is already indirectly creating a system of national identity cards by devising federal standards to regulate state driver's licenses.⁶⁹ As Ignatieff wants to restrict invasions of individual liberty to the greatest extent possible, he should have compared this de facto national identity card system with a more explicit and deliberate process — setting uniform national standards — that reflects a commitment to open and adversarial legislative review. A deliberate and transparent process arguably could better balance concerns about individual freedom and national security than the de facto use of driver's licenses. Instead, with biometric material already within the reach of regulators, the central privacy concerns involve not whether government can check identities but rather when it may do so, based on what threshold of evidence and in conjunction with what other data sources. Again, planning for the use of and limitations on such identify verification capabilities — and ensuring national debate on the issues — would better guard individual freedom than simply standing by as increasingly intrusive public and private security systems develop on an ad hoc basis.

Ignatieff's analysis also would allow the FBI and the Attorney General secretly to apply for and to use electronic surveillance of telephone and Internet communications, which can be authorized solely by the Foreign Intelligence Surveillance Court (p. 134).⁷⁰ That court's proceedings can be held in secret and ex parte simply upon a showing that "the information likely to be obtained is foreign intelligence in-

⁶⁸ See, e.g., Richard Sobel, *The Degradation of Political Identity Under a National Identification System*, 8 B.U. J. SCI. & TECH. L. 37, 48–55 (2002). As other commentators have noted, however, it may be possible to design a system consistent with the civil liberties guaranteed by the Constitution. See Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 701 (2004).

⁶⁹ See Matthew L. Wald, *U.S. To Specify Documents Needed for Driver's Licenses*, N.Y. TIMES, Dec. 9, 2004, at A36.

⁷⁰ Although intended for foreign surveillance, the investigations authorized in this process can often involve American citizens and domestic law enforcement. The court and the Attorney General have devoted considerable effort to structuring guidelines for both cooperation and separation between foreign surveillance activities and domestic law enforcement. See, e.g., *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 613 (Foreign Int. Surv. Ct. 2002); Grayson A. Hoffman, Note, *Litigating Terrorism: The New FISA Regime, the Wall, and the Fourth Amendment*, 40 AM. CRIM. L. REV. 1655 (2003). The boon to domestic law enforcement from the new tools enabled by the counterterrorism push, with the social benefits and incursions on individual rights it implies, should not be underestimated. Government agencies similarly use September 11 laws to increase secrecy about unflattering news. Lyric Wallwork Winik, *Shine the Light on Government Secrets*, PARADE, Mar. 13, 2005, at 15.

formation . . . or is relevant to an ongoing investigation."⁷¹ These investigations can reach inside private residences, which could depart from the Supreme Court's Fourth Amendment doctrine.⁷² Ignatieff seems to rely here on a general implication that foreign intelligence gathering requires departures from prevailing due process standards without even trying less invasive methods (pp. 133–34).⁷³ He ultimately describes the Foreign Intelligence Surveillance Court as a secret court capable of subjecting rights violations to judicial review, although he is frustratingly noncommittal with respect to the potential for these courts actually to prevent rights violations from taking place (p. 134).

But is that court really as protective of privacy rights as Ignatieff hopes? Given its secrecy, how would Ignatieff, or any of us, know? Here, Ignatieff struggles to reconcile his historical analysis with his optimism regarding highly secret and unaccountable tribunals. He concludes that a greater threat to democracy comes from overreaction to terror than from terrorism itself (pp. 57–62, 80); that processes for pruning emergency legislation are necessary to counteract this overreaction (p. 80); and that a democracy should come to see its commitments to restraining executive power, open debate, and individual freedom as strengths, not weaknesses (pp. 59–63). To be consistent with his insistence on open and democratic debate, then, Ignatieff would have to demand a process of review and reassessment — by Congress and ideally by the electorate — to test how well the Foreign Intelligence Surveillance Court has protected the individual freedoms

⁷¹ 50 U.S.C.A. § 1842(c)(2) (West Supp. 2004). The Patriot Act modified preexisting criminal procedure rules — and perhaps constitutional standards — by allowing “sneak-and-peek” searches that permit officers to delay notice to the subject of a search without a prior showing of necessity. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 213, 115 Stat. 272, 285–86 (amending 18 U.S.C. § 3103a(b) (2000)); see also *ACLU v. United States Dep’t of Justice*, 265 F. Supp. 2d 20, 24 & n.5 (D.D.C. 2003) (noting that the Patriot Act modifies the requirement of notice in Federal Rule of Criminal Procedure 41 “and perhaps in the Constitution as well”). The Foreign Intelligence Surveillance Court itself concluded that the Patriot Act may depart from the Fourth Amendment but adheres closely enough to existing constitutional standards to withstand balancing-test scrutiny in view of the nature of the terrorist threat. See *In re Sealed Case Nos. 02-001, 02-002, 310 F.3d 717, 746* (Foreign Int. Surv. Ct. Rev. 2002).

⁷² See Rita Shulman, Note, *USA Patriot Act: Granting the U.S. Government the Unprecedented Power To Circumvent American Civil Liberties in the Name of National Security*, 80 U. DET. MERCY L. REV. 427, 429–34 (2003) (“The trap and trace provisions . . . are contrary to the recent Supreme Court decision in *Kyllo v. United States*.”). In *Kyllo v. United States*, 533 U.S. 27 (2001), the Supreme Court held that the Fourth Amendment prohibits the use of electronic surveillance equipment in the absence of a warrant. *Id.* at 40. Presumably, Ignatieff is imagining surveillance authorized by a warrant — but a warrant issued under the secret and less stringent legal standards used by the Foreign Intelligence Surveillance Court. See *infra* p. 2154 (noting an apparent pattern of FISA court approval of nearly all requests for surveillance).

⁷³ One alternative to the secret FISA court would be the use of in camera proceedings by regular Article III courts, which not only are subject to appellate review, but also proceed in the open, except for review of specific, classified, or privileged evidence.

he thinks critical to a democracy's precommitments. Public review — even long after the fact — is crucial if official misconduct is to be deterred and members of the broader community are to weigh in about what should be done in their name.⁷⁴ The use of in camera proceedings may well be essential to avoid jeopardizing ongoing intelligence investigations, but the absence of publicity calls for some kind of oversight to substitute for the accountability otherwise provided by public and media review.

Episodes in American history reveal jeopardy to democratic values unless public scrutiny persists even in times of perceived danger. The official misinterpretation and misrepresentation of the actual threat posed during World War II by Japanese and Japanese Americans in the United States⁷⁵ stands as a stark reminder of internment as our massive national failure. Ignatieff expresses worry over potentially permanent damage to democracy from unaccountable agents working in secret to distort the public's understanding of the risks they face and the measures necessary to address those threats (p. 155). How and when could we know if such a misinformation campaign were underway in the practices of the Attorney General or the FBI, with secret proceedings of the Foreign Intelligence Surveillance Court as the only source of independent oversight? Evidence available already suggests that, in practice, the Foreign Intelligence Surveillance Court has provided no demonstrable check on administrative requests.⁷⁶ It is not clear how Ignatieff would assess this pattern of consistent judicial ac-

⁷⁴ It may be more an article of faith than an empirically demonstrated truth, but there are numerous assertions of the democratic value of public hearings throughout American jurisprudence. These benefits include guarding against "any attempt to employ our courts as instruments of persecution," *In re Oliver*, 333 U.S. 257, 270 (1948); permitting citizens to keep a watchful eye on the workings of public agencies, *cf. State ex rel. Colscott v. King*, 57 N.E. 535, 535-39 (Ind. 1900); contributing to public debate, *see Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 603, 609 (1978); affording the community the assurance that proceedings were conducted fairly and consistently with the demands of due process, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980); and checking abuse, promoting public debate about the operation of law, and enhancing public confidence in the workings of government, *see Debra D. Stafford, The Advocate for Military Defense Counsel: "Secret Trials": A Defense Perspective*, *ARMY LAW.*, Apr. 1988, at 24-25.

⁷⁵ Crucial to uncovering the evidence of this misinterpretation and misrepresentation was the research published in IRONS, *supra* note 21. Will future historians find documents from our era that will even allow such an exposé of secret intelligence gathering?

⁷⁶ For further discussion of the effectiveness of the FISA court, compare ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 158-63 (2002), with PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 111 (2003). *See also infra* note 81 (discussing Professor Heymann's response to Professor Dershowitz's proposal). For further skepticism about the effectiveness of judicial review to guard against race-based abuses in antiterrorism, see Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 *COLUM. HUM. RTS. L. REV.* 1 (2002).

quiescence or what pattern would challenge his assumption that the court affords adequate independent review.⁷⁷

Similarly, Ignatieff does not explain precisely how to ensure that the lesser-evil tactics he supports — including intelligence gathering through deception, entrapment, and payments, all under cover of official denials (p. 134); targeted assassinations of bona fide terrorists actively engaged in planning imminent attacks (p. 133);⁷⁸ and preemptive military action against states harboring training camps or terrorists preparing imminent attacks (pp. 162–67) — meet his tests of least restrictive means necessary and last resort. Presumably, he would require careful argument and discussion, including adversarial presentation, although it is not clear how such a procedure would work. Would each targeted assassination be permissible so long as subsequent legislative or judicial oversight occurred — even if conducted secretly, and perhaps not for some time? Although Ignatieff concedes that adversarial presentations must take place — both to deter bad official conduct and to permit exploration of actual alternatives — on his view, secrecy could be permitted at least for an unspecified period. Ignatieff's concerns about overreaction and misjudgments imply that democratic review, before too long, must also proceed, lest official miscalculation about the scope of a threat go untested by the light of public scrutiny. Democratic review would compel disclosure to the public about the government's practices and create opportunities to test whether lesser-evil measures were mistakenly adopted.⁷⁹ Ignatieff's optimism about the efficacy of judicial and democratic review — even if entirely secret — is in considerable tension with his insistence that democracies take seriously their commitments to individual rights and democratic accountability. In addition, the book's vague treatment of

⁷⁷ Perhaps he hopes that, when combined with executive accountability, congressional oversight, and an engaged media, judicial review can do more than simply defer to administrative claims of necessity. See *infra* p. 2163–64 (discussing executive accountability). Although Ignatieff could be more candid about the limitations of judicial review when the judges themselves feel the press of emergency and defer to officials, he is right to find crucial contributions that judicial (and congressional and media) review of executive action can make. If officials know and believe that review will be more than a rubber stamp and will become public even if at a later time, they will think twice, justify their decisions, and, at the margin, refrain from some actions. The fact of review thus can deter some degree of overreaching. Moreover, after the fact, the very operation of review can generate public debate about both the effectiveness of lesser-evil policies and whether the measures were worth their costs. It is often because of official review that historical records become available for debate and critique. Official review and the reactions it generates may thus supply materials that create and sustain a democratic culture of self-governance and mutual persuasion.

⁷⁸ See *supra* note 67.

⁷⁹ Such disclosure is especially unlikely, though, when leading officials seem allergic to media and public awareness. Cf. RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 257 (2004) (quipping that Secretary of Defense Donald Rumsfeld may think that lots of Americans, including half the Pentagon press corps, are enemies).

some critical lesser evils makes it difficult to determine whether those policies comport with Ignatieff's standards.

III. WHAT CAN WE TELL ONLY WITH MORE SPECIFICITY?

Without much elaboration, Ignatieff first directs policymakers to subject any coercive measure to the "dignity test," which absolutely would forbid cruel and unusual punishment, penal servitude, extrajudicial execution, rendition of suspects to rights-abusing countries, and torture (pp. 23–24).⁸⁰ Apparently, these practices cross the line beyond the acceptable by turning us into what we swear not to be.⁸¹ It may be the lawyer's occupational hazard, but I find it difficult here not to desire specific definitions and examples of both permissible and forbidden lesser evils to clarify each of these absolute prohibitions.⁸² A comparison of these broad prohibitions to the United States's current lesser-evil policies demonstrates that the "dignity test" is set forth in strokes too broad to provide a meaningful guidepost for legitimate action by a democratic government. Does Ignatieff mean to dispute — as I would — the Bush Administration's claim that neither the Geneva Conventions nor the U.S. Constitution apply to American interrogations of foreigners overseas to prohibit the use of torture or cruel, inhuman, or degrading treatment?⁸³ By attaching a reservation to the

⁸⁰ In finally turning to so basic a concept as human dignity, Ignatieff may implicitly be acknowledging that no set of principles, including his six tests, sufficiently captures the underlying purpose of maintaining ethics while combating terror; nor does any set of principles effectively direct how to weigh each consideration or indicate whether any one should have decisive value. As he ultimately sets aside tests and calls instead for democratic persuasion (p. 169), Ignatieff implicitly acknowledges the truth that all moral and legal codes depend more on the people who enforce and comply with them than on any verbal formulation.

⁸¹ Differing empirical assessments about how best to curb official abuse in combating terrorism may explain Ignatieff's disagreement with Alan Dershowitz's proposal to legalize torture subject to a warrant that would require explicit advance justification. See DERSHOWITZ, *supra* note 76, at 158–63. Ignatieff treats this proposal as a "well-intentioned" effort to bring the rule of law into the interrogation room, but predicts that "[l]egalization of physical force in interrogation will hasten the process by which it becomes routine" (p. 140). Philip Heymann agrees with Ignatieff's conclusion and further argues that relying on judges to monitor torture through the warrant requirement would be a bad bet because "[j]udges have deferred to the last fourteen thousand requests for national security wiretaps and they would defer here." HEYMANN, *supra* note 76, at 111. This same point should raise doubts — for Ignatieff and for others — about reliance on the Foreign Intelligence Surveillance Court even to monitor searches and surveillance, as it currently does, to say nothing of the expansive oversight role that Ignatieff suggests the court could play.

⁸² Sharply defined rules clarify what is covered, what is not covered, and what is unanticipated. The inability of commanders to oversee — and prevent abuses at — the Abu Ghraib prison, for example, was blamed at least in part on the absence of clear rules. Eric Schmitt, *New Interrogation Rules Set for Detainees in Iraq*, N.Y. TIMES, Mar. 10, 2005, at A1.

⁸³ See Memorandum from Assistant Attorney General Jay S. Bybee to William J. Haynes, II, General Counsel, Department of Defense (Feb. 26, 2002), in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 144, 145, 153–69 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS]; Memorandum from President George W. Bush to the Vice

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸⁴ — binding itself only to the extent interrogation, detention, or punishment is prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution — does the United States hold itself to a lower standard than international law?⁸⁵ Does the Eighth Amendment notion of “cruel and unusual” apply only to punishment or also to interrogation and detention?⁸⁶ Even defining what is “cruel and unusual punishment” has proved notoriously controversial — especially as the United States excludes most death penalty cases from that category while most international human rights law reaches the opposite conclusion.⁸⁷ Conversely, penal servitude is permitted under some traditions for acts of high gravity,⁸⁸ yet Ignatieff does not explain why his test would permit the death penalty but prohibit this less severe punishment. Extrajudicial execution is less ambiguously objectionable — for all its faults, a judicially imposed death sentence at least provides minimal procedural safeguards. Yet Ig-

President, the Secretaries of State and Defense, the Attorney General, and Other Officials (Feb. 7, 2002), in *THE TORTURE PAPERS* 134, 134–35. The U.S. government argued that the federal courts lack jurisdiction to consider objections under the Geneva Conventions and the U.S. Constitution to detentions at Guantánamo Bay, and also asserted that such judicial review would disturb the separation of powers mandated by the Constitution. Brief for the Respondents, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/170/respondent_brief.pdf. The Supreme Court rejected these arguments. *Rasul*, 124 S. Ct. at 2699.

⁸⁴ Adopted Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113 (entered into force June 26, 1987) [hereinafter *Convention Against Torture*].

⁸⁵ The American Bar Association produced and endorsed a report that suggested that “severe sleep deprivation,” hooding, “threat[s] of torture,” and exposure to cold all constitute violations of the U.S. Constitution in detention or interrogation contexts. A.B.A., American Bar Ass’n Report to the House of Delegates (Aug. 9, 2004), in *THE TORTURE PAPERS*, *supra* note 83, at 1132, 1138.

⁸⁶ Some judicial authority indicates that protections for detainees are at least as great as those extended to convicted prisoners. See, e.g., *Graham v. Connor*, 490 U.S. 386, 398 (1989); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Hamm v. DeKalb County*, 744 F.2d 1567, 1573–74 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986). Yet more recently, the Supreme Court has indicated that what shocks the conscience under the Fourteenth Amendment varies by context, and that the relatively calm context of post-conviction custody may demand higher standards for acceptable official conduct than the more unpredictable context of a police chase. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850–51 (1998). This analysis suggests greater lenience for interrogation and detention in the antiterrorism initiative proceeding not only prior to conviction, but also prior to trial and indictment.

⁸⁷ See Mary K. Newcomer, Note, *Arbitrariness and the Death Penalty in an International Context*, 45 *DUKE L.J.* 611, 620 (1995) (“The continued imposition of the death penalty in the United States distinguishes this country from much of the international community.”); *id.* at 620–41. But see *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (concluding, as has most of the international community, that the prohibition on cruel and unusual punishment “forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed”).

⁸⁸ See, e.g., Code Pénal Militaire art. 109 (Switz.).

natieff leaves unclear whether an execution ordered by a military commission would qualify as extrajudicial.

Similarly, though rendition of suspects to rights-abusing countries could be the worst form of hypocrisy,⁸⁹ Ignatieff leaves unanswered the harder question: whether transferring individuals to U.S. facilities in those other countries would be prohibited by the same principle. Ignatieff's prohibition of transfer under these circumstances leaves several important questions unanswered: Would it be permissible to transfer an individual to a country known to use torture if there were reliable assurances that the individual would not be tortured there?⁹⁰ What, if anything, could be a reliable assurance from a government known to use torture or other means forbidden in the United States? What if the individual faced coercive interrogation, but not torture?⁹¹

⁸⁹ Pretending to comply with law and ethics while getting others to do your dirty work seems paradigmatic of hypocrisy. Cf. Raymond Thibodeaux, *Once-Prosperous Sudanese Scavenge To Survive*, BOSTON GLOBE, Aug. 24, 2004, at A1 (reporting that the Sudanese government has tried to distance itself from genocidal Janjaweed paramilitary forces it once supported). Nonetheless, the United States government apparently — and secretly — renders uncooperative prisoners to Egypt, Jordan, and other countries willing to use aggressive questioning methods, including torture. See Tom Lue, *Appendix B: Coercive Interrogations*, in PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 155, 155 & n.5, 158 & n.24 (2004) [hereinafter PRESERVING SECURITY AND DEMOCRATIC FREEDOMS] (citing Eric Litchblau & Adam Liptak, *Questioning To Be Legal, Humane and Aggressive, the White House Says*, N.Y. TIMES, Mar. 4, 2003, at A13; and Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation: Long History of Tactics in Overseas Prisons Is Coming to Light*, WASH. POST, May 11, 2004, at A1, for evidence that the United States renders prisoners to nations that engage in torture), available at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/LTLS_final_02_05.pdf; Mayer, *supra* note 60, at 107.

⁹⁰ See PRESERVING SECURITY AND DEMOCRATIC FREEDOMS, *supra* note 89, at 24 (recommending such a policy). For further discussion of this report, see *infra* p. 2161.

⁹¹ Some commentators have argued that the United States may feel more free to send individuals to countries where they face cruel, inhuman, or degrading treatment — prohibited by the U.S. Constitution — than to those where they face torture. Lue, *supra* note 89, at 162 (“According to some commentators, . . . although Congress prohibits U.S. officials from deporting any person to a country where it is more likely than not he will be *tortured*, officials may nonetheless deport persons to countries where they will face *cruel, inhuman, or degrading* treatment that would be unconstitutional if applied in the United States.” (footnote omitted) (citing Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2681-822 (1998); and John T. Parry, *What Is Torture, Are We Doing It, and What if We Are?*, 64 U. PITT. L. REV. 237, 245 n.42 (2003))). Challenges to rendition practices may lead to judicially imposed restrictions. See *Abdah v. Bush*, No. 04-1254, 2005 U.S. Dist. LEXIS 4144, at *17-18 (D.D.C. Mar. 12, 2005) (granting a temporary restraining order to prevent the removal of thirteen detainees from Guantánamo Bay and their rendition to another government); David Johnston, *Judge Limits the Transfer of 13 from Guantanamo*, N.Y. TIMES, Mar. 30, 2005, at A14 (reporting decision by Judge Henry Kennedy to forbid transfer of thirteen detainees absent notice to the court and an opportunity for legal challenge to the removal).

And what, precisely,⁹² is the line between torture and coercive, inhuman, or degrading interrogation?⁹³

⁹² There are principled arguments against defining a concept like torture. Setting forth a precise definition may invite conduct right up to the line rather than deterring conduct that comes anywhere close. Jeremy Waldron has identified this difficulty while specifically warning against the project of defining torture. See generally Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House 12–13* (Nov. 4, 2004) (unpublished manuscript, presented at the Public Law Workshop at Harvard Law School, on file with the Harvard Law School Library). Especially critical of government lawyers who produced memoranda narrowing the definition of torture and providing a legal basis for the government's conduct at Guantánamo Bay and in Iraq, Waldron argues that such efforts are not only fraught with difficulty, but also neglect and interfere with the prohibition against torture as an archetype and thereby create an unfortunate symbol for other areas of law. *Id.* at 12–13, 45–48.

⁹³ Receiving new philosophical attention, the distinction between torture and coercive interrogation may turn on whether the acts in question are performed with the intention of intimidating or terrorizing the subjects. Cf. Jeremy Waldron, *Terrorism and the Uses of Terror*, 8 J. ETHICS 5, 10–16 (2004). The distinction between lawful coercive interrogation and unlawful torture often, however, seems obscure in practice. See *supra* p. 2135 (discussing the Red Cross's description of the treatment of Guantánamo detainees as "tantamount to torture"). Nonetheless, the distinction between coercive interrogation and torture, however obscure, certainly matters. For example, U.S. law subjects interrogators working outside the United States to prosecution if they engage in torture, but not if they use cruel, inhuman, or degrading means. See 18 U.S.C.A. § 2340A (West Supp. 2004). Senator John McCain, who experienced torture when he was a prisoner of war in North Vietnam, has specifically proposed prohibiting "cruel, inhumane or degrading treatment or punishment." Sonni Efron, *Debate Seeks To Define Torture*, L.A. TIMES, Jan. 23, 2005, at A1. The Senate dropped that language from an intelligence bill after then-National Security Advisor Condeleeza Rice objected that it "provide[d] legal protections to foreign prisoners to which they are not now entitled." *Id.* (quoting letter from Rice) (internal quotation marks omitted).

The distinction between torture and cruel, inhuman, and degrading treatment or punishment mattered significantly to the working group of lawyers appointed by the general counsel of the U.S. Department of Defense to report on the legal constraints on interrogation of persons detained by the United States in the "war on terrorism." In what became, once leaked to the media, a controversial document, the initially secret report not only argued that the federal law against torture did not apply to conduct at Guantánamo Bay, but also authorized an exceedingly narrow interpretation of prohibited conduct to permit infliction of pain and suffering if doing so was not the interrogator's express purpose and if mental suffering was not severe or prolonged. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), in *THE TORTURE PAPERS*, *supra* note 83, at 286, 290–96. This narrow interpretation distinguishes the scope of U.S. law from that of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which more broadly — and in the eyes of the working group, more vaguely — banned cruel, inhuman, or degrading treatment in addition to torture. See *id.* at 288–90; see also Convention Against Torture, *supra* note 84. The Working Group Report followed an earlier memo interpreting the federal statute against torture to encompass "only extreme acts" causing the victim to "experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS*, *supra* note 83, at 172, 183. No direct evidence links these two memoranda and the uses of forced nudity, muzzled dogs, and sexual humiliation of detainees at Abu Ghraib and Guantánamo Bay, but observers suggest that the legal advice opened the way for abuse or reflected a "systematic decision" to permit coercive tactics. Karen J. Greenberg, *From Fear to Torture*, in *THE TORTURE PAPERS*, *supra* note 83, at xvii, xix; see also Anthony Lewis, *Introduction to THE TORTURE PAPERS*, *supra* note 83, at xiii, xvi (quoting former National Se-

Even without sharper definitions, Ignatieff's advocacy of prohibitions on cruel and unusual punishment, penal servitude, extrajudicial execution, rendition of suspects to rights-abusing countries, and torture stand in striking contrast to his rejection of absolute bans on aggressive and internationally controversial interrogations, targeted assassinations, and other violence. Ignatieff acknowledges the danger that the prohibited practices could draw antiterrorism into the very kind of limitless violence it is meant to oppose (pp. 119–20). Nonetheless, according to Ignatieff, a firm line between violence and nonviolence cannot mark the distinction between the prohibited and the permissible for one practical if colloquially stated reason: “Liberal states cannot be protected by herbivores” (p. 121). What, then, keeps it a liberal state? For Ignatieff, it is a combination of commitment to the rule of law and cultivation of individual character. Permitted to use some violence, the liberal state needs rules, procedures for oversight, and a sense of individual and community conscience, since “if we need carnivores to defend us, keeping them in check, keeping them aware of what it is they are defending, is a recurrent challenge” (p. 121).

In his most detailed discussion of this challenge, Ignatieff acknowledges that torture “gets out of control” and “becomes lawless” (p. 140) — and then argues that an even more decisive reason for an outright ban is the moral harm to those responsible for carrying it out (p. 142).⁹⁴ Yet he would, within limits, permit coercive interrogation (p.

curity Advisor Donald P. Gregg). A week before the Senate confirmation hearing on the nomination of Alberto Gonzales to be Attorney General of the United States, the Department of Justice issued a new torture policy repudiating the narrow interpretation taken in the prior Department of Justice memoranda. Efron, *supra*. Notwithstanding this prohibition, the government has recently conceded that it uses evidence obtained by torture when deciding whether to extend detentions at Guantánamo Bay. See Michael J. Sniffen, *Panel OK's Torture in Detention of Enemies*, BOSTON GLOBE, Dec. 3, 2004, at A29.

⁹⁴ Ignatieff wrote before the revelations that U.S. military guards in the Abu Ghraib prison in Iraq beat and sodomized detainees — in addition to using electrodes and pouring phosphoric acid on them — but could well have had in mind similar scenarios involving unequivocal torture by poorly trained, unsupervised soldiers. Curiously, Ignatieff defines torture as “the deliberate infliction of *physical* cruelty and pain in order to extract information” (p. 136) (emphasis added). Yet common definitions of torture in international law include intentional infliction of severe mental as well as physical pain. See, e.g., Convention Against Torture, *supra* note 84, art. 1(1), S. TREATY DOC. NO. 100-20 at 19, 1465 U.N.T.S. at 113; Rome Statute of the International Criminal Court, July 17, 1998, art. 7, § 2(e), U.N. Doc. A/Conf.183/9 (2002), available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf); see also J. HERMAN BURGERS & HANS DANIELUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 41 (1988); Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 427, 432 (2003). Although perhaps it was not his intent, Ignatieff's definition is thus far narrower than the prevailing international standard and thus risks association with the exceedingly narrow definition previously developed by the U.S. Department of Justice. See Michael Isikoff et al., *Torture's Path*, NEWSWEEK, Dec. 27, 2004, at 54; see also *supra* note 93 (discussing the Department of Justice memoranda).

141).⁹⁵ Without more specificity, it is impossible to know what he really means.

A good opportunity to test Ignatieff's ethical guides against specific recommendations — and vice versa — comes with the recent publication of a report on lawful antiterrorism strategies.⁹⁶ The report, issued by the Long-Term Legal Strategy Project, emerged from a year of study by a team of academics and former government officials from the United States and Great Britain and was funded by the National Memorial Institute for the Prevention of Terrorism and the Office for Domestic Preparedness of the U.S. Department of Homeland Security.⁹⁷ It offers specific recommendations for balancing freedom and security in the contexts of coercive interrogation, detention, data collection and surveillance, and oversight and review.⁹⁸ The report aims to cabin overreaction by the executive by forcing it to justify its policies and practices to the other branches and, ultimately, to the public.⁹⁹

Take coercive interrogation as an example. Acknowledging the uncertain legitimacy of specific interrogation techniques under international law,¹⁰⁰ the report calls for strict compliance with existing statu-

⁹⁵ He also would permit targeted assassinations under some circumstances (p. 133) — a tactic that, to the disappointment of several observers, the Israeli Supreme Court has declined to consider. See Orna Ben-Naftali & Keren R. Michaeli, *"We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 235 (2003). Widely thought to be contrary to international law, especially when civilians are involved, see, e.g., *id.* at 291; Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism"*, 22 LAW & INEQ. 195, 213 (2004), targeted assassination is receiving new, if controverted, justification. See DERSHOWITZ, *supra* note 76, at 183–84; Wayne N. Renke, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, 41 ALBERTA L. REV. 771, 790–791 (2003) (book review); see also Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123 (1991).

⁹⁶ See PRESERVING SECURITY AND DEMOCRATIC FREEDOMS, *supra* note 89.

⁹⁷ See *id.*

⁹⁸ *Id.* at 1.

⁹⁹ See *id.* at 16–17.

¹⁰⁰ This uncertainty stems from the level of generality in the legal principles and from the distinction in the Torture Convention between an absolute ban on torture, see Convention Against Torture, *supra* note 84, art. 2(2), S. TREATY DOC. NO. 100-20 at 20, 1465 U.N.T.S. at 114, and a more measured duty to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," see *id.*, art. 16(1), S. TREATY DOC. NO. 100-20 at 23, 1465 U.N.T.S. at 116. Contributing to the uncertainty are U.S. reservations accompanying ratification of the Torture Convention that narrow the definition of torture with phrases such as "prolonged mental harm" and "threat of imminent death," see Lue, *supra* note 89, at 162 & n.44 (discussing statutes implementing the Convention), and tie "cruel, inhuman or degrading treatment or punishment" to conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, see *supra* note 85 and accompanying text. Some uncertainty also stems from the fact that the United States has signed but not ratified Protocol I supplementing the Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, 1125 U.N.T.S. 3, which ensures that even individuals who are not prisoners of war are protected against interrogation involving violence or threats of violence to their life, health, or

tory and treaty prohibitions on torture.¹⁰¹ Nonetheless, the report identifies a range of interrogation techniques falling between those forbidden as torture and those that comport with the standard for a voluntary confession under the Due Process Clauses of the U.S. Constitution.¹⁰² This set of techniques includes 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,¹⁰³ all of which British forces have used against suspected members of the IRA.¹⁰⁴ The European Court of Human Rights condemned these techniques as inhuman and degrading but held that they fell short of torture.¹⁰⁵ Israel's Supreme Court forbade similar interrogation practices but specifically distinguished them from torture and held open the possibility of a defense of necessity for interrogators using these techniques.¹⁰⁶ The Long-Term Legal Strategy Project report recommends that the Attorney General develop specific guidelines for the authorization of such coercive interrogation techniques; these guidelines would be subject both to an absolute prohibition on methods that "shock the conscience"¹⁰⁷ and to oversight at six-month inter-

physical or mental well-being. Lue, *supra* note 89, at 159 n.30. Apparently, President Bush sought to take advantage of this ambiguity by declaring detainees held at Guantánamo Bay "enemy combatants" rather than prisoners of war, although some people conclude that the same legal standards apply to both groups. See *In re Guantanamo Detainee Cases*, Nos. 02-CV-0299 et al., 2005 U.S. Dist. LEXIS 1236, at *105-14 (D.D.C. Jan. 31, 2005).

¹⁰¹ See PRESERVING SECURITY AND DEMOCRATIC FREEDOMS, *supra* note 89, at 24.

¹⁰² See *id.*

¹⁰³ Cf. Lue, *supra* note 89, at 174-75 (noting uncertainty about the constitutionality of such techniques); see also *infra* note 107.

¹⁰⁴ See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 41 (1978).

¹⁰⁵ See *id.* at 66-67.

¹⁰⁶ See H.C. 5100/94, Pub. Comm. Against Torture v. Israel, 53(4) P.D. 817, paras. 24-32, available at http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism_law.pdf (English translation by Israeli Supreme Court); Lue, *supra* note 89, at 161 & nn. 42-43. Apparently, Israeli interrogators ended up expansively using physical means, including shaking, sleep deprivation, and forced crouching, rather than reserving them for exceptional cases. See *id.* at 175. As a result, the Israeli Supreme Court forbade use of such techniques unless explicitly authorized by the parliament. Pub. Comm. Against Torture, 53(4) P.D. at paras. 24-32. The Knesset, to date, has supplied no such legislative approval. The Court also declined to establish *ex ante* authorization for acts that might be eligible for a necessity defense after the fact. *Id.* at paras. 32-38.

¹⁰⁷ The report attributes this standard to Article 16 of the Convention Against Torture. See PRESERVING SECURITY AND DEMOCRATIC FREEDOMS, *supra* note 89, at 24. Meanwhile, the U.S. Supreme Court is divided on the question whether the use of coercive interrogation tactics itself violates the Constitution. Compare *Chavez v. Martinez*, 538 U.S. 760, 774-76 (2003) (plurality opinion) (arguing that allowing a wounded suspect to believe that he must respond to police questioning in order to receive medical treatment for the gunshot to his face does not violate the Constitution), and Lue, *supra* note 89, at 163-64 (discussing *Chavez*), with *Chavez*, 538 U.S. at 797 (Kennedy, J., concurring in part and dissenting in part) (arguing that such treatment is equivalent to torture).

vals by the Senate and House Intelligence, Judiciary, and Armed Services Committees.¹⁰⁸

This recommended authorization of potentially coercive, cruel, and inhumane treatment represents a striking departure from the standards applied in the United States to restrict domestic police practices. No doubt for that reason — and with the aim of establishing more constraints than the Bush Administration currently acknowledges — the Long-Term Legal Strategy Project recommends extra procedural hurdles to limit the use of coercive interrogation techniques. The report recommends, for example, that authorized techniques be employed only when there is no reasonable alternative and when there is a written determination, supported by sworn affidavits and subject to congressional and administrative oversight, that there is probable cause to believe an individual possesses significant information about either a “specific plan that threatens U.S. lives” or a “group or organization making such plans whose capacity could be significantly reduced by exploiting the information.”¹⁰⁹ Exceptions to these procedures would be permitted only with explicit written approval by the President and a finding, subject to congressional oversight and review within a reasonable period, of urgent and extraordinary need.¹¹⁰ No information obtained through highly coercive interrogations could be used against the detained individual in any U.S. trial, including a military one.¹¹¹ And individuals subject to coercive interrogations contrary to the provisions of these recommendations would be entitled to civil damages from the United States.¹¹²

These recommendations specifically provide for legislative and judicial oversight, as Ignatieff would require (p. 24). Relative to current practice, they impose significantly greater requirements of advance approval.¹¹³ The recommendations try to remedy current practices that leave selection and approval of coercive interrogation tactics to

¹⁰⁸ See PRESERVING SECURITY AND DEMOCRATIC FREEDOMS, *supra* note 89, at 24–25.

¹⁰⁹ *Id.* at 25.

¹¹⁰ See *id.* at 25–26.

¹¹¹ See *id.* at 26.

¹¹² See *id.* These remedial qualifications reveal how troubling the coercive techniques are in the view of the Project’s authors.

¹¹³ Current practice lacks both accountability and disclosure to the public. See Parry, *supra* note 91, at 261. Although classified and shielded from public scrutiny, lists of methods for “physically and psychologically stressful” interrogation have apparently been approved for use at Guantánamo Bay and in Iraq. See Lue, *supra* note 89, at 156 (citing Dana Priest & Joe Stephens, *Pentagon Approved Tougher Interrogations*, WASH. POST, May 9, 2004, at A1; and James Risen et al., *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1). These techniques include sensory deprivation, stressful positions, dietary manipulation, forced changes in sleep, isolated confinement, and use of dogs. *Id.* at 157. Apparently, U.S. interrogators have also on occasion threatened to use torture or led prisoners to believe that they were being held captive by a country that uses torture. See *id.*

junior military personnel and establish no mechanism to check the President or to hold him accountable.¹¹⁴ This point implies a criterion to supplement Ignatieff's: real executive accountability with allocation of authority to match.

Yet in important ways, the recommendation on coercive interrogation fails Ignatieff's tests. The proposal does not rest on evidence of true effectiveness, as measured in terms that include political as well as other consequences, over either the short term or the long term.¹¹⁵ Use of coercive interrogation could generate sharp disapproval from allies and do serious and lasting damage to the nation's reputation. The proposal also falls short of Ignatieff's requirement that less coercive measures have been tried without success (p. 24). Instead, the report indicates that its standard includes a similar but weaker requirement that alternative means of gathering information "would not be likely to accomplish the same purpose."¹¹⁶

Once described in detail, does the procedure for approving use of coercive interrogation adequately safeguard liberty and dignity — or does it instead permit uses of government power that simply fall below the standards that our laws and morality should allow? I believe that once we see what coercive interrogation involves — and once we see the shortcomings of even careful procedural restraints — we will stand firmly against it.¹¹⁷ Whatever you come to think about this assertion,

¹¹⁴ See PRESERVING SECURITY AND DEMOCRATIC FREEDOMS, *supra* note 89, at 28.

¹¹⁵ The damage to the nation's reputation and credibility, in particular, does not figure in the proposal though it matters vitally in Ignatieff's analysis. Ignoring such political and reputational fallout is imprudent. Even confining effectiveness to generating reliable and relevant evidence, the Project's proposal rests on an insufficient record. Mr. Lue notes both anecdotal evidence supporting the effectiveness of coercive interrogation and methodological problems with distinguishing those techniques from torture and with assessing their effectiveness. See Lue, *supra* note 89, at 167–68. A complete analysis would have to take into account psychological damage to interrogators and retaliation by those who support the victims, in addition to political and moral fallout. See *id.* at 170.

¹¹⁶ PRESERVING SECURITY AND DEMOCRATIC FREEDOMS, *supra* note 89, at 30–31.

¹¹⁷ In my own view, permission to use cruel and degrading treatment of detainees should not become part of our law, even if it is treated as exceptional. Prudential reasons matter here as much as principle; exceptions have a way of seeping into regular practices. Cruel and degrading treatment also has no proven track record of effectiveness. Presidential findings to justify its use are not likely to include more than conclusive rationales. Nor is it ever likely to face genuine or timely review. Moreover, interrogation techniques that exceed usual constitutional practices are bound to offend any who hear about them — including our allies. Their use does not only betray our ideals, it also invites retaliation, undermines our reputation in the world, and exposes our own people to greater risks of similar treatment should they be detained elsewhere in the world. If we give advance approval — even for exceptional use — we cannot disown cruel, abusive, and degrading treatment done in our name. Moreover, "mere" coercion may well fail to force trained terrorists to talk. Then what happens? Interrogators will be tempted to move from coercion to cruel, inhuman, and degrading treatment, or even torture.

Current U.S. law unfortunately seems insufficient to prohibit cruel, inhuman, or degrading interrogation and detention. The Eighth Amendment's ban on cruel and unusual punishment

concrete proposals produce new and vital questions. How much, if at all, should our standards change because of terrible circumstances? Does spelling out the terms for permissible use of physically or mentally painful interrogation techniques effectively condone such techniques beyond the specified circumstances? These are the kinds of questions that become unavoidable in the face of specific measures, as spelled out in the Long-Term Strategy report.¹¹⁸

IV. SO WHAT IS THE GREATEST EVIL?

Michael Ignatieff makes clear that simply adjusting the law so that extraordinary governmental powers are lawful does not meet his requirements. Law would then become circular rather than a firm line; the rule of law would shrink to a fig leaf rather than a tether to enduring values. Ignatieff, like the participants in the Long-Term Legal Strategy Project, seeks a category between the forbidden and the clearly permitted, a zone of acceptable departures from settled law.

may not cover preindictment, pretrial interrogations. American courts may permit a range of coercive practices against suspected terrorists given both the nationwide fear since September 11 and the flexible, contextual interpretation of the relevant constitutional provisions. *See Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (holding the Eighth Amendment to be interpreted in light of “evolving standards of decency that mark the progress of a maturing society”); *Rochin v. California*, 342 U.S. 165, 172 (1952) (advancing the “shocks the conscience” test for interpreting due process under the Fourteenth Amendment). The geographic scope of our constitutional protections may be confined to our territory, prompting offshore detentions and interrogations by U.S. hands and the rendition of detainees to control by other nations. Indeed, some explicitly argue for a “foreign interrogation” exception to U.S. constitutional law. *See M.K.B. Darmer, Beyond bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL’Y 319, 351–54 (2003). Even if U.S. courts forbid use in criminal trials of statements obtained through coercive interrogation, they may stop short of outlawing such interrogations for other purposes. *See Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion); *see also supra* note 107. Whether forbidding cruel, inhuman, or degrading practices requires congressional action or appeals to international law or ethics, the legality and legitimacy of hooding detainees, depriving them of sleep, restricting their access to food and water, or exposing them to excessive noise or cold seems to be in the hands of the American public. Yet the public is given little information in advance or even after the fact and has no easy way to become informed or to take a stand.

¹¹⁸ An insuperable challenge in specifying the tie between means and ends in this context is the enormous number of imponderables: Are coercive interrogation tactics able to generate reliable information? Are less coercive tactics also able to generate reliable information? Even if the information secured is known to be reliable, does it measurably enhance national security? Will knowledge of either its reliability or its utility be available in any time period relevant to the operative decisions? Since the candid answer to each of these questions is most likely “we just don’t know,” it becomes an almost empty exercise to speculate whether alternative, less restrictive means would accomplish the same purpose. Both the effectiveness of means in the short term and their relationship to the ultimate end of increased security are fundamentally unknown. Nonetheless, inquiry into the fit between means and ends should at least restrain government actors from proceeding without some effort to catch hold of the uncertainties and connect proposed actions to reasons. Given the strong impetus to do simply anything in the face of terrifying circumstances — and the sad, documented abuses and violence committed in the name of security and fighting terrorism — even this limited restraint is of vital importance.

But when do such adjustments in the law bend it so far that it breaks?¹¹⁹

Unfortunately, law alone is so pliable that it can be bent beyond recognition. In recent months we have learned that lawyers working — secretly — at the highest levels of government can parse words so well as to pare down the prohibition against torture to apply only to actions producing pain comparable to that caused by organ failure, impairment of bodily function, or death.¹²⁰ Only public outcry after the leak of the “torture memos,” the photographs of grotesque abuse of prisoners at the hands of Americans, and the President’s nomination of a lawyer directly connected to the memos to head the nation’s Justice Department forced the Administration to replace this interpretation with something more closely resembling the prevailing domestic and international standard.¹²¹

Ignatieff’s goals would be better secured by rules employing presumptions than by balancing tests with multiple factors that invariably leave much discretion. For example, given Ignatieff’s call to revisit laws adopted in emergencies, a sunset clause could be required for any emergency-time law that impinges on civil liberties.¹²² Similarly, any U.S. law imposing a greater infringement on civil liberties than comparable initiatives in other leading democracies could be deemed presumptively irrational absent specific evidence of the need for a tougher law here.¹²³ And any domestic law that violates well-settled international law could also be identified as presumptively unjustified, given likely adverse political reactions by the international community.¹²⁴

Yet this proposal to use presumptive rules is itself flawed. Each of these norms would be highly controversial and difficult to implement.

¹¹⁹ For an argument that it is better to sever law adopted in and applicable to the emergency context from the mainstream corpus of the law, see Gross, *supra* note 32. This position is similar to the view that the law should not approve torture in advance, but can excuse it after the fact and thereby keep it out of the corpus of the law. See *supra* note 106 and accompanying text (noting the Israeli Supreme Court’s rejection of coercive interrogation but preservation of a potential necessity defense for those who have used it).

¹²⁰ See Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1.

¹²¹ See *id.*; Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, N.Y. TIMES, Jan. 1, 2005, at A1; see also MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004) (primary documents and reports on abuses of prisoners in Abu Ghraib); *TORTURE: A COLLECTION* (Sanford Levinson ed., 2004) (political, legal, and ethical essays on the legitimacy of torture); *THE TORTURE PAPERS*, *supra* note 83 (memoranda by Department of Justice and White House Counsel); *What on Earth Were They Thinking: Why the Debate on Torture Will Not Go Away*, ECONOMIST, June 19, 2004, at 31, 31–32 (discussing the Department of Justice memorandum).

¹²² Cf. *supra* pp. 2140–41.

¹²³ Cf. *supra* pp. 2145–46 (discussing *THE LESSER EVIL*, p. 24).

¹²⁴ Cf. *supra* pp. 2161–62 (discussing the treatment of coercive, cruel, inhuman, and degrading practices in other countries, and emerging international norms).

Even if these difficulties abated, the form and the specific content of legal norms would never fully or sufficiently guarantee fidelity to our fundamental values while also affording flexibility in response to challenging circumstances.

Ignatieff — and the rest of us — need more than law to guide us if we consider using the lesser evil to combat the greater evil. We need something more compelling than general precommitments to dignity, due process, effectiveness, the idea of the last resort as the only time to compromise our principles, and legislative and judicial review. Although Ignatieff's tests are helpful, even he acknowledges they are not enough. So what is? At some points, Ignatieff calls for deference to a higher law (p. 44). In the end, though, he places his hope in the task of persuasion (pp. 169–70). First, we must try “to ensure that each of us actually believes in our society as much of the time as possible” (p. 169). That objective requires us to work to realize a vision of civil liberties and equal dignity that has yet to be achieved; the spirit of people believing in that vision is our best defense against governmental overreaching (pp. 167–69).¹²⁵ Second, we must work to persuade even the nihilist terrorist that we respect every person's dignity — even his — but also that we will defend ourselves (pp. 169–70).

Hanging all hopes on social persuasion may at first seem a cop-out. Rather than defending a robust vision of civil liberties and equal dignity against which to measure antiterrorist tactics, Ignatieff turns the matter over to public debate. He instructs us to deposit our hopes in the commitment to persuade, and then to abide by the judgment of the democratic community over time. This conclusion, in my opinion, actually is courageous, invigorating, and honest. There could be no more vivid commitment to liberal democracy than this view of persuasion as both inevitable and desirable. Here, Ignatieff rejects claims of necessity, expertise, or other authority to sustain his conclusions. Even the force of law in a democracy depends on whether its content and direction persuade us to be who we want to be. The hope that reason can persuade becomes both aspiration and guide during this dark time — and provides the conclusion for this sober, realistic book.

Such hope hinges on obtaining for *public* review at some reasonable point in time key information about steps the government has pro-

¹²⁵ Philip Heymann reaches a compatible conclusion: “[O]ur pride in being Americans is as important to maintain as our skyscrapers, and . . . therefore political and moral stakes, and the courage of citizens, are as important as greater personal security.” HEYMANN, *supra* note 30, at 179. Alongside our pride and our spirit, our laws may also be crucial. See Emanuel Gross, *The Struggle of a Democracy Against Terrorism — Protection of Human Rights: The Right to Privacy Versus the National Interest — The Proper Balance*, 37 CORNELL INT'L L.J. 27, 28 (2004) (“The moral weapon is no less important than any other weapon, and perhaps even surpasses it — and there is no more effective moral weapon than the rule of law.” (quoting H.C. 320/80, *Kawasma v. Minister of Defense*, 35(3) P.D. 113, 132) (internal quotation marks omitted)).

posed and taken in response to terror.¹²⁶ Before and after periods of crisis — if not immediately in the midst of them — the public needs to know precisely when courts and agencies authorize invasions of individual liberty in pursuit of security. Then, the people require the opportunity to question those decisions. Only with such knowledge and opportunity for debate can people be persuaded rather than compelled or left in the dark.¹²⁷ The government lawyers' crabbed definitions of torture might not survive the public's test, for example, but long-term detentions — complete with genuine opportunities for adversarial review, access to defense counsel, and enforceable conditions of dignified confinement — just might. Or, once made visible, even such detentions might remind us of abusive regimes against which we do and must define ourselves. The question must be not what a government will get away with, but what will inspire the governed to defend and renew their — *our* — society.

Honestly confronting the tragic choices before us, Ignatieff tells us to consider using lesser evils that violate legal principles to fight the greater evils of terrorism. Yet along the way, he builds an eloquent case that the greatest evil is to cast away our hopes for a world in which we each give and receive the human respect that treats us as persuadable. This profoundly challenges the use of any measures that jeopardize the dignity of any human being more than is absolutely necessary and clearly the last resort. Ongoing assessments of these measures must then involve the entire community, not just experts, not just judges on a secret court, and not just application of rules written down in advance.

It is tempting to locate compulsion or coercion in law — or even to conceive of law as a sturdy precommitment, the mast to which we tie ourselves in anticipation of temptations to depart. Yet it is the future that should tug at us. Hope and fear about the future must strengthen us to resist giving up what we care about. Law should frame our practices in this light and make sure power is not used in our name to undermine our future. We can learn much from others — the British, the Israelis — who have long struggled to defend themselves and to

¹²⁶ See *supra* notes 74, 76–77 (discussing the value of public review). Relying on the possibility that community members can be persuaded requires not only that we deposit trust in their judgment, but also that we do what is necessary to ensure that the community is informed, engaged, and capable of exercising judgment. People may need practice in the work of persuasion, the assessment of relevant information, and their role as judges of public policy if reliance on their persuadability is to check and validate governmental steps that are “lesser evils.”

¹²⁷ Thus, *in camera* judicial review may be essential to protect security and intelligence gathering, but public disclosure of the fact of such review — and opportunities to learn about whether and how it works — are necessary to persuade members of a democratic society that such exercise of official power is legitimate.

maintain commitment to human dignity in the face of terror.¹²⁸ Looking back on the violence and war she managed, former Israeli Prime Minister Golda Meir concluded, “We can forgive the Arabs for killing our sons, but not for making our sons killers.”¹²⁹ As vividly as we can, we must imagine our alternate destinies and fight to ensure that we do not become what we hate.¹³⁰

¹²⁸ See *supra* p. 2146 (referring to British experience); *supra* p. 2162 (referring to British and Israeli experiences).

¹²⁹ THE ORTHODOX UNION, GREAT LEADERS OF OUR PEOPLE: GOLDA MEIER, at <http://www.ou.org/about/judaism/rabbis/meier.htm> (last visited Apr. 10, 2005).

¹³⁰ Resisting that fate means fighting people who know that our greatest danger is slipping into becoming what we hate. As Mark Danner says of the Iraqi insurgents:

[T]hey cannot defeat the Americans militarily but they can defeat them politically. For the insurgents, the path to such victory lies in provoking the American occupiers to do their political work for them The insurgents want to place the outnumbered, overworked American troops under constant fear and stress so they will mistreat Iraqis on a broad scale and succeed in making themselves hated.

Mark Danner, *Torture and Truth*, N.Y. REV. BOOKS, June 10, 2004, at 46, 47 (reviewing ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004); and DELEGATES OF THE INT’L COMM. OF THE 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)).

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